Central Law Journal.

ST. LOUIS, MO., MAY 31, 1895.

The decision of the United States Supreme Court, upon rehearing by a vote of five to four, declaring the income tax law unconstitutional, though not unexpected in point of result, naturally causes surprise on account of the fact that the casting vote against the validity of the act was given, not by Mr. Justice Jackson, but by Mr. Justice Shiras, who changed from his previous position in favor of constitutionality, to the opposition. It must be said however that upon the first argument of the case he acquiesced, with some hesitation, in the decision for the general constitutionality of the measure.

Out of the maze of technical subtleties in which able and ingenious counsel enveloped the issue in the case there has finally emerged a remarkably simple doctrine. It is this, that within the meaning of the constitution of the United States, which provides that direct taxes shall be apportioned among the several States, taxes on property of whatever kind are direct taxes, and the fact of there being a distinction between real and personal property makes no difference as regards the direct nature of the tax.

The court reaffirms its decision that taxes on real estate being indisputably direct taxes, taxes on the rent or income of real estate are equally direct taxes. It concludes, furthermore, that taxes on personal property or on the income of personal property are likewise direct taxes, and it holds that the tax imposed by sections 27 to 37 of the tariff act of 1894, so far as it falls on the income of real estate and on personal property, is a direct tax within the meaning of the constitution, and is, therefore, unconstitutional and void, because not apportioned according to representation, all those sections constituting one entire scheme of taxation, and being necessarily invalid.

The court says that it knows of no reason for holding otherwise than that the words "direct taxes" on the one hand and "duties, imposts and excises" on the other were used in the constitution in their natural and obvious sense; nor, in arriving at what those terms embrace, does it perceive any ground for enlarging them beyond or narrowing them within their natural and obvious import at the time the constitution was framed and ratified, and, passing from the text, it regards the conclusion reached as inevitable, when the circumstances which surrounded the convention and controlled its action and the views of those who framed and those who adopted the constitution are considered.

Vol. 40—No. 22.

In the recent case of Gwilliam v. Twist, the English Court of Queen's Bench, as we learn from the *New York Law Journal*, passed upon an exceedingly interesting question. It appeared that the driver of a bus, being drunk, was forbidden by the police to drive and ordered from the box. He went inside, and the conductor, who acquiesced, induced a former omnibus conductor to drive the vehicle back to the yard. By the negligent driving of the latter the plaintiff was injured, and it was held that the proprietor of the bus was liable for damages for such injury, although it did not appear that the conductor had express authority to provide in his discretion for such an emergency. In one of the opinions the governing rule of law is stated as follows: "The law is this: that in cases of sudden emergency, the servant may have authority, within the scope of the employment, to act in good faith, and, according to the best of his judgment, for his employer's interest, provided that he violates no express limitation of his authority, and no order of the master applicable to the case, and provided that the act be not plainly unreasonable."

The *Harvard Law Review* for April, 1895, editorially commenting upon this decision, observes: "This decision, although apparently arrived at with some hesitation, seems so clearly right as to require no discussion; but the questions which it suggests are by no means so easily disposed of. Suppose it a cab instead of an omnibus, no conductor, and only an intoxicated driver, insensible from drink, is it possible then to make the principal liable for a stranger's acts? Probably the same result would be arrived at. Story, for example, says (Agency, 6th Ed., Sec. 142): 'In such cases the stranger performs the functions of the *negotiorum gestor* of the

civil law; and seems justified in doing what is indispensable for the preservation of the property, or to prevent its total destruction.' Wharton, however (Agency, Sec. 355), appears to disagree with this conclusion, and, indeed, if it is to be arrived at, it should not be on the analogy suggested. The Roman Law doctrine of *negotiorum gestio* hardly seems susceptible of being stretched beyond its legitimate limits, *i. e.*, a *quasi* contractual relation between the two parties alone, not extended to include outsiders; and most of the law on the continent on this subject being statutory would seem equally inapplicable to the case. If Story's result is to be reached on contractual theories of agency, it can only be by an implication of what the principal should have meant had he thought about it, and not by a true inference from any actions or understanding on his part. Perhaps, on some other conception of agency, it may be more easily explained. At any rate, the result will probably be worked out on some such line, while the true basis on which the conclusion will be founded is a sound public policy which makes such a solution desirable" (8 Harvard L. R. 496).

NOTES OF RECENT DECISIONS.

NEGOTIABLE INSTRUMENT—NOTE—CONSIDERATION.—In Abbott v. Doane, 40 N. E. Rep. 197, decided by the Supreme Judicial Court of Massachusetts, it appeared that an accommodation note given by plaintiff to a corporation was discounted, and left unpaid at maturity; and defendant, a stockholder, director and creditor of the corporation, in consideration of plaintiff's advancing him money to pay the note, gave plaintiff his note for the amount advanced. It was held that defendant's note was supported by a valid consideration. The court said:

The plaintiff had given his accommodation note to a corporation, which had had it discounted at a bank, and left it unpaid at its maturity. The defendant being a stockholder, director and creditor of the corporation, wishing to have the note paid at once for his own advantage, entered into an agreement with the plaintiff, whereby he was to give to the plaintiff his own note for the amount, and the plaintiff was to furnish money to enable the defendant to take up the note at the bank. This agreement was carried out, and the defendant now contends that his note to the plaintiff was without consideration, because the plaintiff was already bound in law to take up the note at the bank. It is possible that, for one reason or another, both the bank and the plaintiff may have been willing to wait awhile, but that the defendant's interests were imperiled by a delay, and indeed required that the note should be paid at once, and that the corporation whose duty it was primarily to pay it was without present means to do so. Since the defendant was sane, *sui juris*, was not imposed upon, nor under duress, knew what he was about, and probably acted for his own advantage, and it would certainly be unfortunate if the rules of law required us to hold his note invalid for want of a sufficient consideration, when he has had all the benefit that he expected to get from it. In this commonwealth it was long ago decided that even between the original parties to a building contract, if, after having done a part of the work, the builder refused to proceed, but afterwards, on being promised more pay by the owner, went on and finished the building, he might recover the whole sum so promised. (Munroe v. Perkins, 9 Pick. 298; see, also, Holmes v. Doane, 9 Cush. 135; Peck v. Requa, 13 Gray, 407; Rogers v. Rogers, 139 Mass. 440, 1 N. E. Rep. 122; Hastings v. Lovejoy, 140 Mass. 261, 265, 2 N. E. Rep. 776; Thomas v. Barnes, 156 Mass. 581, 31 N. E. Rep. 683. In other States there is a difference of judicial opinion, but the following cases sanction a similar doctrine: Lattimore v. Harsen, 14 Johns. 330; Stewart v. Keteltas, 36 N. Y. 388; Lawrence v. Davey, 28 Vt. 264; Osborne v. O'Reilly, 42 N. J. Eq. 467, 9 Atl. Rep. 209; Goebel v. Linn, 47 Mich. 489, 11 N. W. Rep. 284; Cooke v. Murphy, 70 Ill. 96. In England and in others of the United States a different rule prevails. But when one, who is unwilling or hesitating to go on and perform a contract which proves a hard one for him, is requested to do so by a third person, who is interested in such performance, though having no legal way of compelling it or of recovering damages for a breach, and who accordingly makes an independent promise to pay a sum of money for such performance, the reasons for holding him bound to such payment are stronger than where an additional sum is promised by the party to the original contract. Take an illustration. A enters into a contract with B to do something. It may be to pay money, to render service or to sell land or goods for a price.

The contract may be not especially for the benefit of B, but rather for the benefit of others, as, *e. g.*, to erect a monument, an archway, a memorial of some kind, or to paint a picture to be placed where it can be seen by the public. The consideration moving from B may be executed or executory. It may be money or anything else in law deemed valuable. It may be of slight value, as compared with what A has contracted to do. Now A is legally bound only to B, and, if he breaks his contract, nobody but B can recover damages, and those damages may be slight. They may even be already liquidated at a small sum by the terms of the contract itself. Though A is legally bound, the motive to perform the contract may be slight. If after A has refused to go on with his undertaking, or while he is hesitating whether to perform it or submit to such damages as B may be entitled to recover, other persons interested in having the contract performed intervene, and enter into a new agreement with A, by which A agrees to do that which he was already bound by his contract with B to do, and they agree jointly or severally to pay him a certain sum of money, and give their note or notes therefor, and A accordingly does what he had before agreed to do, but what perhaps he might not otherwise have done, no good reason is perceived why they should not be held to fulfill their promise.

They have got what they bargained for, and A has done what otherwise he might not have done, and what they could not have compelled him to do. This is so held in England, and the view is supported by English text writers, though not always for precisely the same reasons. Scotson v. Pegg, 6 Hurl. & N. 295; Shadwell v. Shadwell, 30 Law J. C. P. 145; Pol. Cont., 6th ed., 175, 177; Anson, Cont., 4th ed., 87, 88; Leake, Cont., 3d ed., 540. In this country the courts of several States have taken the opposite view, though in some instances the cases referred to as so holding, when examined, do not necessarily lead to that result. These cases are collected in the defendant's brief and in Williston's] discussion of the subject in 8 Harv. Law Rev. 27. Without dwelling further on the reasons for the doctrine, it seems to us better to hold, as a general rule, that if A has refused or hesitated to perform an agreement with B, and is requested to do so by C, who will derive a benefit from such performance, and who promises to pay him a certain sum therefor, and A thereupon undertakes to do it, the performance by A of his agreement, in consequence of such request and promise by C, is a good consideration to support C's promise.

DURESS — THREATS OF IMPRISONMENT — MORTGAGE. — The Supreme Court of Nebraska decide in Hargreaves v. Korcek, that threats of prosecution and immediate imprisonment of the husband, when used to induce a man and his wife to execute and deliver a mortgage upon their homestead to secure the payment of a judgment against him, where the threats so overcome their wills as to induce them to affix their signatures to such mortgage, and thus give a security which they would not voluntarily have executed, are sufficient to constitute duress, and avoid the operation of the instrument so obtained. Upon the law of the case the court says:

In the case of Morse v. Woodworth (Mass.), reported in 29 N. E. Rep. 525, it appeared that Morse had been book-keeper for Woodworth, and was suspected, and probably guilty, of an embezzlement of money belonging to his employer, and by threats of prosecution and imprisonment a settlement was obtained from Morse for the money which he was accused of appropriating. The action was by Morse, to, in effect, avoid such settlement. It was admitted that no criminal or civil proceedings had been commenced against him, and his right to avoid his acts rested upon the ground that the threats of imprisonment had moved him to make the settlement, and constituted duress, and entitled him to have the settlement annulled. It was held that: "Where the defendant, by such threats of arrest and imprisonment as would overcome the mind and will of an ordinary man, compels a settlement which plaintiff would not have made voluntarily, plaintiff, even though guilty of the embezzlement, may avoid such settlement on the ground of duress." And in the text of the opinion it is stated: "The question of law involved is whether one who believes, and has reason to believe, that another has committed a crime, and who, by threats of prosecution and imprisonment for the crime, overcomes the will of the other, and induces him to execute a contract which he would not have made voluntarily, can enforce the contract if the other attempts to avoid it on the ground of duress. Duress at the common law, is of two kinds—duress by imprisonment and duress by threats. Some of the definitions of duress *per minas* are not broad enough to include constraint by threat of imprisonment. But it is well settled that threats of unlawful imprisonment may be made the means of duress as well as threats of grievous bodily harm. The rule as to duress *per minas* has now a broader application than formerly. It is founded on the principle that a contract rests on the free and voluntary action of the minds of the parties meeting in an agreement which is to be binding upon them. If an influence is exerted on one of them, of such a kind as to overcome his will, and compel a formal assent to an undertaking when he does not really agree to it, and so make that appear to be his act which is not his but another's imposed on him through fear which deprives him of self-control, there is no contract, unless the other deals with him in good faith, in ignorance of the improper influence, and in the belief that he is acting voluntarily. To set aside a contract for duress, it must be shown, first, that the will of one of the parties was overcome, and that he was thus subjected to the power of another, and that the means used to induce him to act were of such a kind as would overcome the mind and will of an ordinary person. It has often been held that threats of civil suits and of ordinary proceedings against property are not enough, because ordinary persons do not cease to act voluntarily on account of such threats. But threats of imprisonment may be so violent and forceful as to have that effect. * * * A contract obtained by duress of unlawful imprisonment is void, and if the imprisonment is under legal process, in regular form, it is nevertheless unlawful as against one who procured it improperly for the purposes of obtaining the execution of a contract, and a contract obtained by means of it is void for duress. So it has been said that imprisonment under a legal process, issued for a just cause, is duress that will avoid a contract if such imprisonment is unlawfully used to obtain the contract. Richardson v. Duncan, 3 N. H. 508. See, also, Foshay v. Ferguson, 5 Hill, 154; U. S. v. Huckabee, 16 Wall. 414, 431; Miller v. Miller, 68 Pa. St. 486; Walbridge v. Arnold, 21 Conn. 424. It has sometimes been held that threats of imprisonment, to constitute duress, must be of unlawful imprisonment. But the question is whether the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener, who is seeking to obtain a contract by his threat. Imprisonment that is suffered through the execution of a threat which was made for the purpose of forcing a guilty person to enter into a contract may be lawful as against the authorities and the public, but unlawful against the threatener, when considered in reference to his effort to use for his private benefit processes provided for the protection of the public and the punishment of crime.

One who has overcome the mind and will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of laws which were made for another purpose, and he is in no position to claim the advantage of a formal contract obtained in that way, on the ground that the rights of the parties are to be determined by their language and their overt acts, without reference to the influences which moved them. In such a case there is no reason why one should be bound by a contract obtained by force, which in reality is not his, but another's. We are aware that there are cases which tend to support the contention of the defendant.

Harmon v. Harmon, 61 Me. 227; Bodine v. Morgan, 37 N. J. Eq. 426, 428; Landa v. Obert, 45 Tex. 540; Knapp v. Hyde, 60 Barb. 80. But we are of the opinion that the view of the subject heretofore taken by this court, which we have followed in this opinion, rests on sound principles, and is in conformity with most of the recent decisions in such cases, both in England and America. Taylor v. Jaques, 106 Mass. 291; Hackett v. King, 6 Allen, 58; Harris v. Carmody, 131 Mass. 51; Bryant v. Peck & Whipple Co., 154 Mass. 460, 28 N. E. Rep. 678; Williams v. Bayley, L. R. 1 H. L. 200; 4 Giff. 638, 663, note; Adams v. Bank, 116 N. Y. 606, 23 N. E. Rep. 7; Eadie v. Slimmon, 26 N. Y. 9; Foley v. Greene, 14 R. I. 618; Town of Sharon v. Gager, 46 Conn. 189; Bane v. Detrick, 52 Ill. 19; Fay v. Oatley, 6 Wis. 42. We do not intimate that a note given in consideration of money embezzled from the payee can be avoided on the ground of duress, merely because the fear of arrest and imprisonment if he failed to pay was one of the inducements of the embezzler to make the note. But if the fact that he is liable to arrest and imprisonment is used as a threat to overcome his will, and compel a settlement which he would not have made voluntarily, the case is different. The question in every such case is whether his liability to imprisonment was used against him, by way of a threat, to force a settlement. If so, the use was improper and unlawful; and, if the threats were such as would naturally overcome the mind and will of an ordinary man, and if they overcame his, he may avoid the settlement." See, also, Bank v. Croco (Kan.), 26 Pac. Rep. 939; Morrison v. Faulkner (Tex. Sup.), 15 S. W. Rep. 797; Morrill v. Nightingale (Cal.), 28 Pac. Rep. 1068; Horton v. Bloedorn, 56 N. W. Rep. 321, 37 Neb. 666; Hullhorst v. Scharner, 15 Neb. 57, 17 N. W. Rep. 259.

INSURANCE—POLICY ISSUED BY AGENT TO HIMSELF.—In Medberger v. Hartford Fire Ins. Co., 17 South. Rep. 282, it is decided by the Supreme Court of Mississippi that a policy of insurance, issued by an agent of the insurance company to himself, without the knowledge or consent of the company, on a stock of goods which he holds as receiver is void. The court says:

The cases mainly relied on by counsel for appellant are Thompson v. Insurance Co., 136 U. S. 287, 10 Sup. Ct. Rep. 1019, and Northrop v. Insurance Co. (Wis.), 4 N. W. Rep. 350. The former is wholly inapplicable. Kearney never was the agent of the insurance company, nor was Thompson. But Kearney, being receiver, was approached by the agent of the insurance company, and solicited to insure the trust property, which he did, and paid the premium out of the trust funds, prior to any order directing him to do so, and the company set up as one defense that he had no authority so to use the trust funds in paying the premium before such order, and that the contract was void as to the company on that ground, which defense was of course scouted. The cases are utterly unlike. The court held that the title of property in a receiver's hands is in its owner's, and the possession is the possession of the court; but these matters are aside from the real point under discussion. In the other case the owner of property insured sent his son to the insurance agent, Edwards, to get insurance, and, after it was gotten, put the insurance agent in charge, to guard and watch it, and without compensation, so far as appears. The insurance agent was not the general agent of the owner of the property. That this case is understood to hold that the guarding the property was a collateral matter, aside from the insurance, is shown by what Mr. Biddle says about this case in section 497, vol. 1, of his work on Insurance, when he observes: "Of course, a mere employment by the other party, in another matter, would not be material." The opinion in the case confines it within its own limits, and cites no authorities. We have examined all the authorities cited in 1 Am. & Eng. Enc. Law, pp. 300, 301, note 1, and find them to be cases where a "middle man" receives commissions from both parties merely for bringing them together. He was not the agent of either party in the contract made by and between them after they met. Of this class of cases, Dixon, C. J., is quoted in Barry v. Schmidt, 57 Wis. 174, 15 N. W. Rep. 24, as saying: "A broker, whose undertaking merely to find a purchaser at a price fixed by the seller, or at a price which shall be satisfactory to the seller when he and the purchaser meet, is in reality only a 'middle man,' whose duty is performed when the buyer and seller are brought together, and as to whom the policy of the law which excludes double compensation has been considered inapplicable." But where the agent of the seller is the agent of the buyer in the sale itself, a different principle obtains, as is clearly shown in Rupp v. Sampson, 16 Gray, 401. The true doctrine governing here is thus expressed in an elaborate note at page 281, 7 Am. St. Rep. (Potter's Appeal [Conn.] 12 Atl. Rep. 513): "Therefore it is an undisputable rule of law that unless, with the free and intelligent consent of his principal, given after full knowledge of all the facts and circumstances, the agent cannot, in the same transaction, act for both principal and the adverse party." This is the principle which must control here. The receiver here, of his own motion, issued these policies to himself, as receiver, acting in their issuance as the agent of the companies. The companies knew nothing of it till after the property was destroyed. A receiver is not an agent. The very term "receiver" negatives such an idea. He is an indifferent person, holding property for the parties ultimately entitled. But he receives a commission as receiver, which gives him a direct, personal, pecuniary interest. As agent of the insurance company, it is his duty to look with the clearest and most critical eye to the risk, moral and physical. As a receiver, it is his personal interest to keep in existence the property in his custody, so as to increase his commissions by the increased labor bestowed upon the property. Besides, it is to be noted in this case that an assignment was executed to Wildberger as assignee, and he therefore had the legal title and possession for the purposes of the trust, under the assignment, in addition to the possession which he had as receiver, which last is really the possession of the court.

Counsel on neither side have furnished us with an identical case, and we have been unable to find one. It may very well be that the general principle set forth in Mechem on Agency (sections 66-68) so manifestly covers the case at bar that it has not been seriously questioned. It was very pertinently observed by Sir W. M. James, L. J., in Panama & S. P. Tel. Co. v. Inda Rubber, etc., Co., 10 Ch. App. 515, 14 Moak, 759: "The clearer a thing is, the more difficult it is to find any express authority, or any *dictum* exactly to the point." We are clearly of opinion that an insurance agent, who has been appointed receiver of property, cannot, of his own motion, without the consent of his principal, issue as such agent, to himself as

such receiver, a policy of insurance valid against such principal, because his duties of the two positions are inconsistent, and he does have a direct personal interest to the extent at least of his commissions. "A contrivance" it has been pithily put, "which reduces the two parties to one, and admits an agent representing antagonistic interests to make a bargain by himself, is so far against the policy of the law that the contract is held to be void, unless the principal chooses afterwards, and with a knowledge of all the circumstances that affect his possessions, to ratify the act of his agent." Mercantile Mut. Ins. Co. v. Hope Ins. Co., 8 Mo. App. 411, cited 7 Am. St. Rep. 281, note, *supra*. The two parties principals here are the insurance company and Wildberger acting for himself. And it may with equal force be said that the same human being, subject to the temptations springing from that self-interest which leaves the balance so "rarely right adjusted" in the best of men, cannot, by some magical process, separate himself into two wholly distinct characters, and in one character, as agent of an insurance company, contract with himself in another character, as receiver or otherwise, having always a personal interest in the contract adverse to his principal.

CRIMINAL LAW—CONVICTS—ESCAPE—SENTENCE.—The Supreme Court of Ohio hold in Henderson v. James, 39 N. E. Rep. 805, that an escaped convict, who is convicted and sentenced to the penitentiary for another crime, may, at the expiration of the latter sentence, be held to serve out the remainder of his first sentence. Upon this point the court says:

The latter part of section 7325, Rev. St., provides that, "if any convict escape from the penitentiary, . . . no part of the time such convict is absent shall be counted as a part of the time for which such convict was sentenced." The plaintiff in error claims that, as his sentence in Cuyahoga county was not made to begin in the future, his imprisonment under that sentence began at once upon his arrival at the penitentiary, and that, by virtue of the above section, his imprisonment under the Warren county sentence again began to run immediately upon his return to the penitentiary, so that both sentences were being served at the same time, and that, upon the expiration of the longer sentence, he was entitled to his discharge from both sentences. There was no attempt to invoke the doctrine of cumulative sentences, and the prisoner was sentenced to five years without knowledge on part of the court that he was an escaped convict. As we have no statute authorizing cumulative sentences for crime, it would seem at first blush that such sentences should not be permitted in this State; but this court, with the courts of most of the other States, as well as England, has sustained cumulative sentences without the aid of a statute. Williams v. State, 18 Ohio St. 46; Picket v. State, 22 Ohio St. 405; Larney v. Cleveland, 34 Ohio St. 599; Bish. Cr. Law, § 953; Rex v. Wilkes, 4 Burrows, 2575; State v. Smith, 5 Day, 175; Fitzpatrick v. People, 98 Ill. 269; Mims v. State, 26 Minn. 498, 5 N. W. Rep. 374; Mills v. Com., 13 Pa. St. 631; Russell v. Com., 7 Serg. & R. 489; *In re* McCormick, 24 Wis. 492; Kite v. Com., 11 Metc. (Mass.) 581. In Texas, Indiana, and Kentucky, the courts hold cumulative sentences unauthorized. In Indiana there is a statute to the effect that the term of service shall commence on the day of conviction and sentence. See Kennedy v. Howard, 74 Ind. 87; Prince v. State, 44 Tex. 480; Hannahan v. State, 7 Tex. App. 664; Baker v. State, 11 Tex. App. 262, and James v. Ward, 2 Metc. (Ky.) 271. The great weight of authority is in favor of cumulative sentences, and they should be upheld on principle. The severe punishments which induced judges to invent technicalities to aid the acquittal of those on trial, on criminal charges, no longer exist; and, under our just and humane statutes, those who violate the law should be duly punished for each offense. Tilghman, C. J., in Russell v. Com., 7 Serg. & R. 489, well says: "But, to consider the thing on principle, where a man has been sentenced to imprisonment for one offense, and is afterwards convicted of another, what can be so proper as to make his imprisonment for the second offense commence at the expiration of the first imprisonment? Would it not be absurd to make one imprisonment a punishment for two offenses? Nay, the absurdity does not end there, for, unless imprisonment for the last offense is to begin where the imprisonment for the first ends, it would be impossible, under our system, to punish the offender, in certain cases, for the last offense, at all."

But, as there was no attempt to impose a cumulative sentence in this case, it might be said that the doctrine of cumulative sentences is not involved in this case. It has been argued at length, and in one phase of the case it is pertinent. Had the court known that the prisoner on trial was the escaped convict Henderson, the court might, on proper proof of that fact, have sentenced him to five years' service in the penitentiary, and ordered him to be delivered to the warden, and fixed his term of service to begin at the expiration of the Warren county sentence. The power of the court to do this, in the absence of any statute, seems clear from the cases above cited. Again, had the court known that the prisoner under indictment in Cuyahoga county was the escaped convict Henderson, the warden of the penitentiary might have been notified, and the convict returned to the penitentiary, to serve out his Warren county sentence. Being then in the penitentiary under a sentence from one county, and under indictment for another crime in another county, section 7234, Rev. St., would have been applicable, and under that section he could have been taken from the penitentiary to Cuyahoga county, and tried under the indictment pending against him there, and, upon conviction, he could have been sentenced to the penitentiary, and returned thereto, under section 7238, Rev. St.; to serve out the full term of both sentences. Sections 7234 and 7238 are as follows:

"Sec. 7234. A convict in the penitentiary who escaped or forfeited his recognizance before receiving sentence for a felony of which he was convicted, or against whom an indictment for felony is pending, may be removed to the county in which such conviction was had, or such indictment is pending, for sentence or trial, upon the warrant of the court of such county; but this section shall not extend to the removal of a convict for life, except the sentence to be imposed, or the indictment pending against him, is for murder in the first degree."

"Sec. 7238. If such convict be acquitted, he shall be forthwith returned by the sheriff to the penitentiary, there to serve out the remainder of his term; but if he be sentenced to imprisonment in the penitentiary, he shall forthwith be returned thereto by the sheriff, and his term of imprisonment thereon shall begin to run from the expiration of the term for

which he was imprisoned at his removal; or, if he be sentenced to death, such sentence shall be executed as if he were not under sentence of imprisonment in the penitentiary."

These two sections clearly show the legislative intent that convicts shall serve out one sentence for each offense of which they are convicted and sentenced. It is therefore clear, from these two sections, and the decisions of this court sustaining cumulative sentences, that the service under the Cuyahoga county sentence could apply on that sentence only, and that, after having served out that sentence, he still remained an escaped convict under the Warne county sentence, subject to be held to serve out the remainder of that sentence. As he concealed his true name and identity, and was sentenced by the name of Scott, his term to begin *in præsenti*, the warden was bound to receive and treat him as designated in the record; and even had the warden recognized him at first sight, as being the escaped convict Henderson, he would have been powerless to treat him as such, so long as the sentence from Cuyahoga county remained in force and unsatisfied. Both the warden and the prisoner were conclusively bound by the record and sentence in that case. While for many purposes there is nothing in a mere name, yet for many other purposes a name is very important. The plea of abatement by reason of a wrong name, and the disclosure of a true name, is a very valuable protection to the prisoner, as, in case of a second prosecution for the same crime, he can with more force invoke the record of the first case in support of his plea of former acquittal or conviction. Lasure v. State, 19 Ohio St. 51. In Mead v. State, 26 Ohio St. 505, the judgment was reversed on the ground that Elish Davidson and Elijah B. Davidson are different names, and that the description of a person by one of these names is not supported by proof of a person bearing the other name. A person allowing himself to be tried and convicted by the name mentioned in the indictment is, for the purpose of serving out the sentence under such conviction, conclusively held to be the person bearing such name, and he cannot lawfully gain any advantage by concealing his true name and identity. He may take his chances, as did the plaintiff in error; and, if he succeeds, well and good for him; but, should his identity and true name be discovered before his discharge, he would be liable to be held as an escaped convict to serve out his old sentence. The warden, therefore, was right in holding the prisoner to serve out the remainder of his Warren county sentence.

BAGGAGE IN THE CUSTODY OF THE PASSENGER.

A common carrier of goods is not liable as an insurer for property of which he does not have the sole custody. This rule is well settled, and the same principle is frequently applied to the case of baggage, it being argued that when the passenger does not deliver his effects to the carrier and surrender his control, during the time of the journey to him, the latter should not be held to the extraordinary liability of a common carrier.

Nevertheless it does not follow that in every case where the baggage is taken into or placed at his request in the vehicle in which he is riding, in order that he may have the use of it during the journey, that he, the passenger, has assumed custody of it or has taken it out of the legal custody of the carrier.[1]

Railroads.—The principles to be applied to cases such as these will, as a general rule, be varied more or less by the question: (A.) Has there been a delivery to the carrier? (B.) Though in the possession of the carrier has the passenger himself assumed the custody of the article? (C.) Has the passenger's own conduct contributed to the loss? In the first case the carrier obviously could not be charged with any liability, in the second, the carrier would be liable as an insurer if it had the custody, and for negligence only if the passenger had assumed the custody, and in the last the contributory negligence of the passenger would be a legal bar to his action.

(A.) In Tower v. Utica R. Co.,[2] the plaintiff, a passenger, went into a car with his overcoat on his arm, which he threw on his seat, and when he left the train at its destination forgot to take it with him. The carrier was held not liable, the court saying: "The overcoat was not delivered into the possession or custody of the defendants, which is essential to their liability as carriers. * * * If they were under any obligation to take charge of the article in question after it was discovered to have been left in the car (and it is not necessary to deny that they were), ordinary care is all that can be exacted, and that was sufficiently established." So in a Canadian case where a passenger entered a car just before the train started, left his valise on a vacant seat and went out, and upon his return the valise was gone, it was held that there had been no sufficient delivery of the valise to the carrier, it not appearing that anyone was in charge of the train at the time.[3]

A railroad is not liable for the negligent destruction of a sum of money in the custody of the passenger and carried by him, without notice to the carrier, for a purpose unconnected with the expenses of the journey. Thus where plaintiff intrusted a package of money to his agent to carry, and the agent,

[1] Le Couteur v. R. Co., L. R. 1 Q. B. 54; 6 B. & S. 961; 13 L. T. (N. S.) 325.

[2] 7 Hill, 47, 42 Am. Dec. 36.

[3] Kerr v. R. Co., 34 U. C. C. P. 209.

while a passenger on the railroad, was killed, and the money which was carried on the agent's person, without notice to the railroad company, was destroyed by the company's negligence, it was held that the company was not liable for the loss of the money.[4] Again, in an Iowa case a passenger gave his overcoat, containing a pocketbook in which was the sum of $500 which he was taking with him for the purpose of making an investment, to the porter of the sleeping car, who hung it up in his berth. He had money enough for traveling expenses elsewhere about his person. During the journey the train was derailed, the car in which he was riding being thrown on its side and taking fire. The passenger got out safely, and after the fire was extinguished he told the porter in regard to the money, and the overcoat was returned to him, but the pocketbook had disappeared. It was held that there was no cause of action against the railroad.[5]

A carrier is liable for a personal injury to the passenger arising by an assault upon him by a fellow passenger or an outsider, when the carrier has failed to protect from such injury. But if in the course of such an assault money or articles of value in the custody of the passenger, not being "baggage," and of which the carrier had no notice, should be stolen or lost, the latter could not be held responsible. Thus, in a New York case, cars arriving at an outer street of New York were disconnected to be drawn down by horses, leaving a car standing alone, on which was W., a passenger, with no employee thereon. As W. stepped to the door he was attacked by persons not passengers, and robbed of $16,000 in United States bonds, which he was carrying on his person without notice to the railroad company. In an action against the company for failing to protect him, it was held that the loss of the bonds could not be considered in fixing the damages.[6] But in this case it was not denied that were a passenger assaulted in the vehicle of the carrier, and the carrier should fail in his duty to protect him, and he should be robbed of portions of his clothing or usual and reasonable articles of personal ornament, his watch or his purse, with the money for his traveling and other personal expenses, the carrier would be liable for the loss thus sustained.[7]

(B.) Several well considered English cases lay it down, that if the passenger has not assumed the custody of the article, the fact that it is placed in the carriage with him, and therefore is under his more immediate control and inspection, does not relieve the carrier from his extraordinary responsibility. In one of these cases[8] it was proved that the plaintiff's wife became a passenger upon a railway carriage, and that a dressing case which she was taking with her was placed in the carriage under the seat, and that on the arrival of the train at her destination, the porters of the company took upon themselves the duty of carrying her luggage from the railway carriage to the hackney carriage, which was to convey her to her residence. The dressing case was lost, but at what time did not appear. The carrier was held liable, the court saying that the fact that it was placed in the railway carriage with her made no difference. In the Le Couteur case, already referred to, the passenger's valise had been placed by the railroad porter on the seat of the carriage in which he was riding, and the court said that it would require "such circumstances as would lead irresistably to the conclusion that the passenger takes such personal control and charge of his property as altogether to give up all hold upon the company before we say the company, as carriers, are relieved from their liability in case of loss."[9] But the authority of these cases would seem to be shaken by the more recent case of Bexyheim v. R. Co.,[10] where it is held by the Court of Appeal that a railroad is not an insurer in respect of baggage placed at a passenger's request in the same compartment in which he intends to travel, and cannot be made to compensate him if baggage so placed is lost or stolen without any negligence on its part.

The American authorities seem to agree that a railroad is not responsible as a common carrier for an article of personal baggage kept by a passenger exclusively within

[4] First National Bank v. Marietta, etc., R. Co., 20 Ohio St. 259, 5 Am. Rep. 655. And see Wilcox v. The Philadelphia, 9 La. 80, 29 Am. Dec. 436.

[5] Hillis v. R. Co., 33 N. W. Rep. 643 (Ia.).

[6] Weeks v. New York, etc., R. R. Co., 72 N. Y. 50.

[7] Weeks v. R. Co., *supra*.

[8] Richards v. R. Co., 7 M. G. & S. 50; 6 Eng. R. R. & C. Cas. 49; 62 Eng. Com. L. 837.

[9] And see Gamble v. R. Co., 24 U. C. Q. B. 407.

[10] L. R. 3 C. P. Div. 221; 6 Cent. L. J. 222 (1878).

his control, unless the loss arises from the neglect of its agents and servants, thus regarding the carrier in such a case as a bailee for hire and not an insurer.[11] But in the following case negligence of the carrier was held to be proved, and he was held liable, viz: Where a passenger, on leaving the car at a station for the purpose of getting his dinner, inquired of an employee in the car whether his baggage would be safe if left in the car, and was told to leave it there; that it would be safe. He left it in the car, and on his return found that the car had been detached from the train and his baggage removed to another car, where he could have a seat. On going to this car he found only part of his baggage. No notice of the change had previously been given to him.[12] In Hannibal, etc. R. Co. v. Swift,[13] baggage and munitions of war were being transported by the defendant railroad, and it was urged that the carrier was not liable as such for their loss, because a guard of soldiers went with the train to protect the property from the public enemy. But the court said: "The control and management of the car or of the train by the servants and employees of the company were not impeded or interfered with; and where no such interference is attempted, it can never be a ground for limiting the responsibility of the carrier that the owner of the property accompanies it and keeps a watchful lookout for its safety."

(C.) "All the books agree that if the negligence of the passenger conduces to the loss of the goods, the carrier is not responsible."[14] Thus where a passenger on leaving the train at his destination, forgot to take his overcoat which he had placed on the seat beside him, the carrier was held not liable, the court saying: "The loss in this case occurred through the gross neglect of the plaintiff. Common sense and attention on his part would have prevented it. A passenger might as reasonably complain because he had forgotten to leave the cars at the point of destination and been carried beyond it, as to do so in a case like the present. The carrier is not bound to act as guardian for his passenger, and treat him as a ward under age. The passenger must at least assume the responsibility of taking ordinary care of himself, including the wearing apparel about his person." In a very similar case of a passenger in a chair-car, the court said: "If the appellee carelessly and negligently left his pocketbook in the car when he reached his destination, and its contents were abstracted by persons other than the servants of the company, there would be no liability on the part of the company, for it is only by reason of the fact that the company owes some duty to the passenger as such that there is any sort of responsibility resting on it in relation to his property, which for the time is considered as a part of his person. But when a passenger leaves a train at its destination, the company may reasonably think that he has taken with him all those things which he is accustomed to carry about his person, and until it is shown that the property is discovered by its agent to have been left behind, we know of no principle of law by which it can be charged with any duty concerning it."[15] So in a recent case in Massachusetts, where a passenger in a day parlor-car, had in her possession, and kept under her own control, a satchel containing valuables, and, on reaching a station, she, with her husband, left the car for several minutes, leaving the satchel in the car near an open window where any person on the station platform could easily have abstracted it, and it was stolen, it was held that plaintiff was negligent, and the car company not liable.[16] In an English case, a passenger whose portmanteau had been placed at his request in the car with him, got out at a way-station and then carelessly failed to get into the same car again, but finished his journey in another car. The article was stolen by passengers in the first car, but it was held that the railroad was not liable. In return, the court said, for the convenience of having his luggage at hand, the passenger should during the journey take such reasonable care of his own property as might be expected from an ordinarily prudent man, and should not, by his own negligence, expose it to more than

[11] Kinsley v. R. Co., 125 Mass. 54; Clark v. Burns, 118 Mass. 275, 19 Am. Rep. 457.

[12] Kinsley v. R. Co., 125 Mass. 54.

[13] 12 Wall. 262.

[14] Tower v. R. Co., 7 Hill, 47, 42 Am. Dec. 36, citing Whalley v. Wray, 3 Esp. 74; Jeremy Carr. 55, 156.

[15] Ill. Cent. R. Co., Handy, 63 Miss. 609, 56 Am. Rep. 846.

[16] Whitney v. Pullman Palace Car Co., 9 N. E. Rep. 619.

the ordinary risk of luggage carried in a passenger carriage.[16a]

A railroad is not liable for a loss resulting to a passenger from its refusal to stop the train upon which he was riding, short of a usual station, to enable him to recover a hand-bag containing a large sum of money and valuable jewelry which he was carrying with him, and which he dropped from the window of the car while attempting to lower the sash.[17]

Carriers by Water.—Some light may be shed upon this subject by a brief examination of the decisions in regard to the liability of a carrier by water, for property of the passenger kept in his own possession and not delivered to the carrier for custody. The passenger by ship or vessel is usually assigned a room like a guest at an inn, in which to sleep and to which he takes such articles as he requires for his personal use during the trip or voyage. And it has been asked, is not the carrier, so far as he provides this separate place to sleep, acting in the capacity of an innkeeper, and subject to the same liability as is the innkeeper for the baggage of his guests in their rooms. This question was ably discussed by the Supreme Court of Michigan in McKee v. Owen,[18] where a female passenger occupying a stateroom on a steamer, upon going to bed at night, rolled up her dress, with her portmonnaie, containing a sum of money, in its pocket, and laid it upon the upper berth of the stateroom. During the night the money was stolen through a broken window of the stateroom. She brought an action against the owner of the vessel to recover for the loss, and the court below instructed the jury that, having retained the money in her possession, she could not recover. The case went to the Supreme Court, where, the judges being equally divided upon the question, the judgment was affirmed: Christiancy and Cooley, JJ., being of opinion that the carrier was liable, as an innkeeper would have been, while Campbell, J., and Martin, C. J., thought differently. The view of Christiancy and Cooley, JJ., has not, in the opinion of the writer, found favor with other courts, either in the case of a carrier by water[19] or of a sleeping car company, where the same arguments have been more than once advanced.[20]

The apparently conflicting views of the courts, in the case of carriers by water, may be easily reconciled when the kind of property for which recompense is asked is considered; and a distinction will be found to exist between (*a*) property which the passenger carries about his person, and (*b*) property which, for his convenience merely, he takes to his room instead of delivering to the baggagemaster or other proper officer of the boat.

(*a.*) As to articles carried upon or about the person—the clothing he is wearing, the watch or jewelry carried in his pocket, the money in his purse or the like—it seems to be generally settled that the carrier is not liable, because there has been no delivery to him, and the question of the carrier's negligence and want of care is not material.[21]

(*b.*) As to the ordinary baggage of passengers by ships and steamboats, the best considered of the cases support the statement of the law as made by Mr. Hutchinson in his work on Carriers,[22] viz: that their baggage may be taken by them into the staterooms which are assigned to them, without relieving the carrier from any of his responsibility for its safety, as a common carrier, in the absence of negligence on the part of the passenger contributing to its loss,[23] unless forbidden by a regulation of the vessel, or otherwise specially prohibited,[24] or unless it appear as a matter of fact that the passenger has taken it into his charge *animo custodiendi*, to the exclusion of the carrier, the assignment to the room being generally "a designation of the place in which the traveler may put his ordinary baggage," without excluding the custody of the carrier.[25]

[16a] Tally v. R. Co. L. R., 6 C. P. 44.

[17] Henderson v. R. Co., 20 Fed. Rep. 430, 123 U. S. 61, 8 S. Ct. 60.

[18] 15 Mich. 115.

[19] See the cases hereafter cited.

[20] See *post* Sleeping Car Companies.

[21] Clark v. Burns, 118 Mass. 275. The Chrystal Palace v. Vanderpool, 16 B. Mon. 302.

[22] § 700.

[23] As in Gleason v. Goodrich Trans. Co., 32 Wis. 85, where it was held that the passenger was negligent in leaving his baggage in an unlocked room. And see Williams v. Keokuk Co., 3 Cent. L. J. 400.

[24] In Macklin v. New Jersey Steam Co., 7 Abb. Pr. (N. S.) 241, a regulation of the boat forbidding passengers from taking their baggage into their staterooms except at their own risk was held unreasonable and void, so far as it would apply to light baggage or satchels containing articles for present use in travel.

[25] Gore v. Trans. Co., 2 Daly, 254; Mudgett v. Steam-

Sleeping Cars.—It is well settled that a sleeping car company, so far as its responsibility for the baggage and valuables of passengers is concerned, is not a common carrier.[26] And it is also denied—although the car might well be likened in many respects to a moving inn—that his responsibilities are those of an innkeeper. The sleeping car proprietor is, however, bound to take reasonable care to protect the property of the passenger, especially while he is asleep, and for any neglect of his duty he will, in the absence of contributory negligence on the part of the passenger, be responsible.[27] It must, therefore, keep a watch during the night, see to it that no unauthorized persons intrude themselves into the car and take reasonable care to prevent thefts by the occupants.[28] Thus negligence was held to be present so as to render the company liable; where property in the plaintiff's berth was stolen while he was asleep, both the conductor and porter being asleep at the rear end of the car for two or three hours, leaving the front door unlocked and a brakeman sitting in the front end of the car;[29] where, on the occasion of a similar theft, the conductor was absent from the car for a distance of 84 miles, having left the train altogether, leaving no one about the car but the porter, who was engaged in blacking boots in a room at the end of the car;[30] where the plaintiff having occasion to open her valise, which was in her berth, was assisted by the conductor who, instead of returning it to the berth, said it would be perfectly safe in the unoccupied seat opposite, and himself placed it there, from which place it was stolen in the night.[31]

This duty does not terminate with the period during which the passenger is actually asleep, but it extends to keeping a reasonable watch over such of his necessary baggage and belongings as he cannot conveniently take with him, nor watch himself while he is absent from his berth preparing his toilet, or for other necessary purposes,[32] or where he may temporarily leave the car, leaving his personal baggage there.[33]

The passenger's contributory negligence will, of course, bar a recovery. The passenger was held to be guilty of contributory negligence when, on getting out of his berth in the morning he went to the lavatory, leaving in the pockets of his vest under his pillow his watch and a large sum of money.[34]

It does not affect the case at all that the property of the passenger is in his own possession and custody. As well put in the Blum case:[35] "It is undoubtedly the law that where a passenger does not deliver his

boat Co., 1 Daly, 151; Gleason v. Trans. Co., 32 Wis. 85, 14 Am. Rep. 716; Macklin v. N. J. Steamboat Co., 7 Abb. Pr. (N. S.) 24; Van Horn v. Kermit, 4 E. D. Smith, 453; American Steam. Co. v. Bryan, 83 Pa. St. 446; Walsh v. The Wright, 1 Newb. Adm. 494; Dunn v. New Haven Steam Co., 12 N. Y. Supp. 406, 58 Hun, 461. *Contra:* Cohen v. Frost, 2 Duer, 335.

[26] Blum v. South. Pull. Car Co., 3 Cent. L. J. 592; Pullman Pal. Car Co. v. Smith, 73 Ill. 360, 24 Am. Rep. 258; Crozier v. R. Co., 43 How. Pr. 466; Woodruff Sleeping Car Co. v. Diehl, 84 Ind. 474, 43 Am. Rep. 102; Barrott v. Pull. Pal. Car Co., 51 Fed. Rep. 796; Pull. Pal. Car Co. v. Freudenstein, 34 Pac. Rep. 578 (Colo.).

[27] Blum v. South. Pull. Car Co., *supra;* Diehl v. Woodruff, 10 Cent. L. J. 66; Woodruff Sleeping Car Co. v. Diehl, 84 Ind. 474; Palmeter v. Wagner, 11 Alb. L. J. 149; Welch v. Pull. Pal. Car Co., 17 Abb. (N. S.) 352; Bevis v. R. Co., 56 Am. Rep. 850, 26 Mo. App. 23; Ill. Cent. R. Co. v. Handy, 63 Miss. 607, 56 Am. Rep. 846; Hampton v. Pull. Pal. Car Co., 42 Mo. App. 140; Root v. Sleeping Car Co., 28 Mo. App. 199; Scaling v. Pull. Pal. Car Co., 24 Mo. App. 29; Pull. Pal. Car Co. v. Gardner, 16 Am & Eng. R. R. Cas., 324; Tracy v. Pull. Pal. Car Co., 67 How Pr. 154; Lewis v. N. Y. Cent. R. Co., 9 N. E. Rep. 615 (Mass.); Pullman Pal. Car Co. v. Pollock, 5 S. W. Rep. 814 (Tex.); Carpenter v. R. Co., 124 N. Y. 53, 26 N. E. Rep. 277; Barrott v. Pull. Pal. Car Co., 51 Fed. Rep. 796; Pull. Pal. Car Co. v. Freudenstein, 54 Pac. Rep. 578 (Colo.).

[28] Blum Case, *supra;* Woodruff Sleeping Car Co. v. Diehl, 84 Ind. 474; Diehl v. Woodruff, 10 Cent. L. J. 66; Palmeter v. Wagner, 11 Alb. L. J. 149; Ill. Cent. R. Co. v. Handy, 63 Mass. 609, 56 Am. Rep. 846; Scaling v. Pull. Pal. Car Co., 24 Mo. App. 29; Carpenter v. R. Co., 124 N. Y. 53, 26 N. E. Rep. 277.

[29] Blum Case, *supra.*

[30] Diehl v. Woodruff, 10 Cent. L. J. 66; Woodruff Sleeping Car Co. v. Diehl, 84 Ind. 474. And see Bevis v. R. Co., 56 Am. Rep. 850, 26 Mo. App. 23; Scaling v. Pull. Pal. Car. Co., 24 Mo. App. 29; Pull. Pal. Car Co. v. Gardner, 16 Am. & Eng. R. R. Cas. 324.

[31] Hampton v. Pull. Pal. Car Co., 42 Mo. App. 140. So where money stolen from the passenger's berth while he was asleep; another passenger lost a sum of money in a similar manner at the same time; and it appeared that the porter was found asleep in the early morning, and that he was on duty for 36 hours, including two nights, continuously. Lewis v. New York Cent. Sleeping Car Co., 9 N. E. Rep. 615. Under a similar state of facts it appeared that the only employee kept on the car while it ran from New York to Boston, making eight stops on the way, was a man who acted as conductor, porter and bootblack. Carpenter v. R. Co., 26 N. E. Rep. 277, 124 N. Y. 53.

[32] Root v. Sleeping Car Co., 28 Mo. App. 199.

[33] Pull. Pal. Car Co. v. Pollock, 5 S. W. Rep. 815 (Tex.).

[34] Root v. Sleeping Car. Co., 28 Mo. App. 199; Wilson v. R. Co., 32 Mo. App. 682.

[35] *Supra.*

property to a carrier, but retains the exclusive possession and control of it himself, the carrier is not liable in case of a loss, as, for instance, when a passenger's pocket is picked, or an overcoat or satchel is taken from a seat occupied by him. Upon this theory, it is insisted by defendant that it cannot be held liable for negligence, inasmuch as the clothing and effects of its guests are never formally delivered to it. I cannot for a moment accede to this proposition. It is scarcely necessary to say that a person asleep cannot retain manual possession or control of anything. The invitation to make use of the bed carries with it at invitation to sleep, and an implied agreement to take reasonable care of the guest's effects while he is in such a state that care, upon his own part, is impossible. There is all the delivery which the circumstances of the case admit."[36]

The liability of the company extends to his clothing and personal ornaments, the small articles of luggage usually carried in the hand and a reasonable sum of money for his traveling expenses.[37] The word "baggage" has no special or restricted meaning when applied to such articles as the passenger may carry with him in his valise instead of placing in a trunk or delivering to the baggage-master of the railroad, but has the meaning which I have already pointed out.[38] Hence the liability of sleeping-car companies for a loss resulting from a failure to keep reasonable watch over, and to use reasonable diligence to protect its patrons' baggage, extends to such articles of baggage as are ordinarily or usually carried by travelers in like situation, in valises which they carry with them into the car, provided they would be considered baggage in an action against an ordinary carrier of passengers.[39] But it does not extend beyond this so as to cover money in the keeping of the passenger to an amount beyond what would be required for traveling expenses.[40]

[36] And see Pull. Pal. Car Co. v. Freudenstein, 34 Pac. Rep. 579.

[37] Blum's Case, *ante;* Diehl v. Woodruff, 10 Cent. L. J. 66; Woodruff Sleeping Car Co. v. Diehl, 84 Ind. 474; Root v. Sleeping Car Co., 38 Mo. App. 199.

[38] See article in 38 Cent. L. J. 4.

[39] Hampton v. Pullman Palace Car Co., 42 Mo. App. 134.

[40] Ill. Cent. R. Co. v. Handy, 63 Miss. 609, 56 Am. Rep. 846; Root v. Sleeping Car Co., 28 Mo. App. 197; Wilson v. R. Co., 32 Mo. App. 682; Barrott v. Pull. Pal. Car Co., 51 Fed. Rep. 796; Hillis v. R. Co., 33 N. W. Rep. 643 (Ia.); Blum's Case, *ante.*

The sleeping-car company is liable for such articles in the custody of the passenger as fall within the denomination of "baggage," and which there is a duty upon it to protect, even where they are stolen or abstracted by its servants,[41] and in such an action the contributory negligence of the passenger would be no defense.[42] But as to articles not baggage, the passenger having no right to their free transportation, there is no duty on the carrier to protect it, and if such property should be stolen by its servants, the carrier would not be responsible, for "a master is not liable for the torts or crimes his servant commits, not within the scope of his employment, but to effect some purpose of his own, unless such tort or crime is of itself a violation of some duty which the master has assumed toward the person injured, and which he has undertaken to perform through the servant."[43]

While it is held in Missouri, the naked fact that a passenger has been robbed when asleep in the sleeping-car, is not evidence of negligence on the part of the defendant, yet where the circumstances of the theft tend to show that but for the defendant's negligence, the loss would not have occurred, a *prima facie* case of negligence arises, and the burden of proof is shifted. "The sleeping passenger can never know whether or not the defendant's servants are keeping diligent watch, and they have the strongest interest to exonerate themselves from any charge of negligence. A rule that would prevent the case from going to the jury without affirmative proof that at the time when the theft took place, or at some time during the night, the defendant's servants were not keeping watch would in most cases deprive passengers of any redress for the loss which they might sustain through the negligence of such carriers,

[41] Root v. Sleeping Car Co., 28 Mo. App. 199.

[42] Root v. Sleeping Car Co., *supra.* "The duty of the defendant through its servants," it is well said in this case "would be to protect the passenger's property although discovered in an exposed condition where his carelessness may have left it." Bonner v. De Mendoza, 16 S. W. Rep. 776 (Tex.); Wilson v. R. Co., 32 Mo. App. 682; Pull. Pal. Car. Co., Matthews, 12 S. W. Rep. 744 (Tex.).

[43] Root v. Sleeping Car Co., 28 Mo. App. 199, citing Croft v. Alison, 4 B. & Ald. 590; Coal Co. v. Helman 86 Pa. St. 418; Mitchell v. Crassweller, 13 C. B. 236; Jackson v. R. Co., 87 Mo. 430; Finncane v. Small, 1 Esp. 315; Schmit v. Blood, 9 Wend. 268; Whitemore v. Harroldson, 2 Lea. 312.

such a rule is not only against reason, but is against public policy and ought not to be declared."[44] In a recent Colorado case, it is, however, laid down that while negligence must be shown in actions against sleeping-car companies, the fact of the loss sufficiently shows it so as to place the burden upon the defendant to prove that it has discharged its legal duty. But in the case it was ruled that the presumption of negligence on the part of defendant arising from such loss is rebutted by the uncontradicted evidence of the car porter that he was on duty, and engaged in watching the car, through the night, till after the loss.[45]

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[44] Bevis v. R. Co., 26 Mo. App. 21.

[45] Pullman Palace Car Co. v. Freudenstein, 34 Pac. Rep. 578.

NOTE—NOTICE OF PROTEST—ASSIGNEE OF MAKER.

AMERICAN NAT. BANK V. JUNK BROS. LUMBER & MANUF'G CO.

Supreme Court of Tennessee, May 3, 1895.

1. The maker of a note for the accommodation of the indorser is a surety to the indorser, and the latter is not entitled to presentment, protest, or notice.

2. A notice of dishonor, addressed to a corporation, indorser on notes, is good if sent to what had been its place of business, where its affairs were in process of settlement under a deed of assignment, the corporation being insolvent, and the executive officers, except the general manager, scattered; it being the place where the mail of the corporation was delivered and opened by the assignee.

3. When a general assignment, as contemplated by law, has been made, notice to the assignee of the dishonor of paper indorsed by the assignor will bind the latter.

BEARD, J.: This suit was instituted against the Junk Bros. Lumber & Manufacturing Company, a corporation, with its *situs* in Nashville, as the indorser for value of certain domestic negotiable notes. The defendant resisted recovery on the ground that notice of dishonor of the paper was not given as the law requires. A decree having been pronounced against the corporation, it has filed the record in this court, and the action of the court below in overruling this defense is assigned as error.

Before coming to the general question raised by the assignments, it is proper to dispose of five of these notes, which are shown by the proof to have been made for the accommodation of this corporation, and afterwards indorsed by it to the complainant. As to these notes, their makers stood in the situation of sureties to the indorser, and it was the latter's duty to provide funds to meet them at maturity, and it was therefore bound to the holder without presentment, protest, or notice. 2 Am. & Eng. Enc. Law, 399; 2 Daniel, Neg. Inst. § 1085; 3 Rand. Com. Paper, § 1205; Black v. Fizer, 10 Heisk. 48. Thus disposing of those 5 notes, the question recurs as to the liability of the defendant as indorser of the remaining 35. The facts disclosed in the record are that for a considerable period of time the Junk Bros. Lumber & Manufacturing Company was engaged in manufacturing in Nashville, with its business office located at the corner of First and Woodland streets in that city. Its books were kept there, and there its mail, with that of the principal officers and its various employees, was delivered. On the 28th of May, 1892, the corporation, being insolvent, made a general assignment of all its property, both real and personal, to one, Stainback, as assignee, for the benefit of all its creditors. This assignment was a full surrender to the assignee, and by its terms "vested him with all powers and authority to do all acts and things which may be necessary in the premises to the full extent of the trust" created, and it authorized him "to ask, demand, recover, and receive of and from all and every person or persons all property, debts, and demands due, owing, and belonging to" said assignee, and "to give acquittances and discharges for the same," "to execute and deliver deeds," and to use the name of the assignor whenever the purpose of the trust required. Immediately on the execution of the assignment the assignee took charge of the property covered by it, and went into possession of the office of the corporation, with its books, iron safe, etc., and employed at this office a young man to do such clerical work as was required in the administration of the trust. For a limited time after the day of the appointment, with the old employees of the corporation, he continued to run its machinery, for the purpose of converting its raw material into manufactured goods. In winding up the affairs of this trust he took into his service as such assignee, one, Spain, who was a stockholder, as well as the director and general manager of this corporation at the date of the assignment, and who continued, according to the testimony in the case, to sustain these relations to it after that date. It is true, the duties imposed by the assignee upon Spain made it necessary for him to be principally in the yard and about the plant; but the proof is that he was in this office every day, and sometimes more than once during the day. The mail of the corporation was delivered there as before, and, assuming to be entitled to the control of it, the assignee opened it personally or by his clerk, and gave it such attention as it required; and no officer of the corporation ever called in question his right to control it, although, in the nature of things, all the officers must have known that he was receiving it, and so dealing with it. After the assignment, the corporation abandoned business, and all of its execu-

tive officers (with the single exception of the general manager) were scattered, and each one pursued his own private affairs at other points in the city of Nashville. After that time it had no other officer, and there were but two meetings of the board of directors, and these were held in private offices, and with regard to past and unimportant transactions. Beginning with the date of the assignment, and for several months thereafter, the paper sued on matured, and, payment on proper demand having been refused, it was protested by the notary public, and notice of the protest in each instance save two was directed by him to the corporation by name, and was left by him at the office heretofore mentioned. In the two excepted cases or instances the notices were addressed to "George W. Stainback, Assignee of the Junk Bros. Lumber & Mfg. Co." In all these cases, as notices were received, the clerk of the assignee entered a memorandum of the protest in the books of the corporation, kept by him, and generally deposited these notices in the safe. The officers of the corporation insist that they did not receive these notices. Conceding this to be true, is the defendant bound as indorser under the foregoing facts, notwithstanding the lack of actual receipt of these notices? Where the indorser has failed to receive notice, he is discharged, unless the holder can show that he has used due diligence in his effort to communicate notice. Where this can be shown, however, it is immaterial that the notice does not reach the indorser. Harris v. Robinson, 4 How. 336. So it is that legal notice is not necessarily actual notice. Bank v. Sanborn, 63 Me. 340. Thus, an indorser who changes his residence without the knowledge of the holder of the protested paper is bound by notice sent to his former place of residence, if the holder is not guilty of negligence in his failure to have knowledge of the change. In such a case the holder, in the absence of any fact to put him on inquiry, can well assume that the indorser's residence continues where it formerly was. He is not bound to go upon the street to ascertain a fact which he has the right to assume he already knows. Bank v. Sanborn, *supra;* Bank v. Phillips, 3 Wend. 408; Requa v. Collins, 51 N. Y. 148; 2 Daniel, Neg. Inst. § 1083; 3 Rand. Com. Paper, § 1281; Harris v. Bank, 4 Humph. 518. The well-established rule is that, where personal notice is not given, the notice must be sent to the place where the indorser will be most likely to receive it, and, if there is reasonable diligence exercised by the holder in ascertaining this place, this is all the law demands. Bank v. Shaw, 142 Mass. 290, 7 N. E. Rep. 779, is in many respects similar to this case, and will serve to illustrate this rule. The facts in that case were that F. Shaw & Co. had done business at 268 Purchase street, in Boston, and while so engaged indorsed the paper in question. Before its maturity the firm became insolvent, and made a general assignment to one, Wyman, for the benefit of their creditors. The assignee took possession of the office of the firm, and used it in the administration of his trust, but he permitted the sign of the firm to remain tacked to the door. At the maturity of the paper, F. Shaw was a fugitive from Massachusetts, and in hiding in Canada. The notice of protest, addressed by the notary to the firm by its proper name, was left by him at this office. F. Shaw, when subsequently sued on this paper, defended upon the ground that this notice was not sufficient to bind him, but the court held that it was good, "because it was sent to what had been the place of business of the firm, where its affairs were actually in process of settlement under the trust." It is true that in the opinion announced the fact of Shaw being a fugitive at the time of the notice is given its due weight by the court, but this was not by any means controlling in the conclusion reached. So in *Ex parte* Baker, 4 Ch. Div. 795, the facts were that Bellman & Co., who had done business at "Oak Brewery," but were no longer doing so, drew drafts on one Hay, which were dishonored. Before their maturity, Bellman had become bankrupt, and a trustee had been appointed for his estate. Notice of dishonor was directed to the drawers at "Oak Brewery," and yet, in the absence of proof that the trustee was in possession of the old place of business of the firm, the notice was held to be sufficient. Again, in Bank v. Shaw, 79 Me. 376, 10 Atl. Rep. 67, upon facts like those considered in Bank v. Shaw, *supra*, and in an action against the indorsers, the court say: "Notices were addressed to them at their former place of business, where their affairs were being settled by a trustee to wohm they had made an assignment for the benefit of their creditors, and we have no doubt that the notices were received by the latter. Notices so sent and mailed are sufficient." It is unnecessary to extend the discussion of this question. It is sufficient to say that, in view of all the facts of this case, as well as in the light of the authorities, we have no hesitation in holding that the corporation is liable as indorser on all this paper where notices of protest were addressed to it in its corporate name.

But it is insisted, however, that at least the corporation is not liable on the two notes, the notices of the protest of which were addressed by the notary to "G. W. Stainback, Assignee of the Junk Bros. Lumber & Mfg. Co." Whether notice of protest to the trustee of a bankrupt's estate or to the assignee of an insolvent assignor making a general assignment is sufficient, has been the subject of uncertainty of opinion with some of the text writers and of conflict among others. Mr. Byles in his work on Bills (Wood's Ed.) p. 294, says: "If the drawer of a bill become bankrupt, notice must nevertheless be given to him, whether a trustee be appointed or not." A number of English cases are cited by the author in his note to this text, some of which support it and others do not. Parsons says: "If a person entitled to notice be bankrupt, notice should be given to him, if the assignees are not yet ap-

pointed. If they are, notice, perhaps, should be given to them," etc. 1 Pars. Notes & B. 500. Judge Story, says: "If the party entitled to notice be a bankrupt, and assignees have been appointed, and the holder knows it, notice should be given to them." Story, Prom. Notes, § 307. Mr. Daniel says: "If the party be a bankrupt, it is best to give notice to him, and to his assignee also." If, however, "given to the assignee alone, it would probably be sufficient." 2 Daniel, Neg. Int. § 1002. On the other hand, Mr. Chitty says: "If the party entitled to notice be a bankrupt, notice should be given to him before the choice of assignees, and after such choice to them." Chitty, Bills, p. 228. The author of the article on bills and notes (Mr. Charles Merrill Hough, of the New York bar) in 2 Am. & Eng. Enc. Law, p. 412, says: "Upon the bankruptcy of an indorser, and before the appointment of an assignee, the bankrupt himself is the proper person to notify; but the assignee, when appointed, should receive all notices of dishonor." Mr. Tiedeman says: "If the drawer or indorser be bankrupt, notice should be given to the assignee, if there be one, particularly if the party has absconded." In one of the latest, and perhaps the most elaborate, of the treatises on the subject of commercial paper—that of Mr. Randolph—the author says: "After the drawer or indorser of a bill has become bankrupt, notice of its dishonor must be given to him or to his assignee. If an assignee has been appointed, and his appointment is known, the notice should be given to him." 3 Rand. Com. Paper, § 1243. Mr. Wade, in his work on Notice, says: "When the indorser or drawer becomes bankrupt subsequent to drawing or indorsing the bill or note, the notice should be given to the assignee, when one has been selected prior to the dishonor of the instrument." This question seems to have been considered and determined in only three of the American courts. The Supreme Court of Kentucky, in Callahan v. Bank, 82 Ky. 231, in the case of a voluntary general assignment for the benefit of creditors, after a full and careful consideration of the authorities, announced as the law of that State that notice to the assignee in such an assignment would bind the indorser and his estate, and this upon the ground that by this act of the assignor he was under the assignment, in a qualified sense at least, the general representative of his indebtedness. On the other hand the Supreme Court of Ohio in House v. Bank, 43 Ohio St. 346, 1 N. E. Rep. 129, by a majority opinion, declined to recognize the authority of this case, making a distinction between an assignee under a voluntary general assignment and an assignee in bankruptcy. In this latter case, however, there is a strong dissenting opinion by two of the judges of that court, in which the soundness of the rule as announced by the Kentucky court is earnestly insisted upon. The case of Bank v. Shaw, 79 Me. 376, 10 Atl. Rep. 67, is in harmony with the rule in Callahan v. Bank, *supra*, although the latter case is not mentioned in the opinion of the court. This question has been heretofore undetermined in this State, and we are at liberty, therefore, to establish that rule which is most in accord with what we conceive to be the weight of authority and reason. We are satisfied, therefore, to hold the law to be that, whenever a general assignment is made as contemplated by our law, the assignee in such assignment so far stands in the shoes of his assignor that notice to such assignee of the non-payment of indorsed paper will bind such indorser. The judgment of the court below is affirmed.

NOTE.—*Notice of Protest.*—It is quite plain that if the party to be notified actually receives in time the notice sent him it is wholly immaterial where it was directed. 2 Amer. & Eng. Encyclopedia of Law, 415; Bradley v. Davis, 26 Me. 45; First Nat. Bank v. Wood, 51 Vt. 471; Dicken v. Hall, 87 Pa. St. 379. But ordinarily the burden is on the holder to show where it was sent (Money v. Casee, 20 La. Ann. 419; Carter v. Burley, 9 N. H. 558), and that it was directed to the proper place. Turner v. Rogers, 8 Ind. 139; Stiles v. Inwan, 55 Miss. 469. The place named in the notary's certificate as the indorser's residence is presumed to be so until the contrary is shown. Linkon v. Hall, 27 Gratt. 668; Walmsley v. Rivers, 34 Iowa, 463. But, *contra*, Crawford v. Branch Bank, 7 Ala. 206. Notice may be served at the former office of a firm in dissolution if there is any one there representing the partnership. Bliss v. Nichols, 12 Allen, 443; Bank of North America v. Shaw, 7 East. Rep. (Mass.) 779. If the notice is sent by mail addressing it to the post-office of the town in which he resides is enough. Lafitte v. Perkins, 21 La. Ann. 171; Fowler v. Warfield, 4 Cr. C. C. 71. In general the address should be to the post-office nearest the indorser's home. Union Bank v. Stoker, 1 La. Ann. 269; Senaca County Bank v. Neass, 3 N. Y. 442. But where he habitually got his mail at two post-offices, one in the town of his residence and the other not, a notice directed to the latter office is bad without proof that the indorser actually received it. Shelbrime Falls Nat. Bank v. Townley, 107 Mass. 444. Notice sent the drawer of a bill at the place of date of the bill is *prima facie* good, the presumption being that that is his place of residence. Perce v. Sturthers, 27 Pa. St. 249. If after diligent inquiry the indorser's residence cannot be found, notice addressed to him at the place of the date of a note is good. Sasscer v. Whitely, 10 Md. 98. But a holder who has any notice of the removal of his indorser must make reasonable inquiry for his new address or notice sent to the old one will be invalid. Banker v. Clane, 20 Me. 156; Bank v. Phillips, 3 Wend. 408; McVeigh v. Bank, 26 Gratt. 785; McVeigh v. Allen, 29 Gratt. 588. Notice sent to an indorser at his residence during his temporary absence is good. Curtis v. State Bank, 6 Blackf. (Ind.) 312; Planters' Bank v. White, 2 Humph. (Tenn.) 112; Man v. Johnson, 9 Yerg. (Tenn.). If a drawer or indorser designates a place as his address, notice sent there is good without regard to his place of residence or business. Eastern Bank v. Brown, 17 Me. 356.

Upon the bankruptcy of an indorser and before the appointment of an assignee the bankrupt himself is the proper person to notify. *Ex parte* Fremont Nat. Bank, 2 Lowell (U. S.), 409. But the assignee when appointed should receive all notices of dishonor. Canridge v. Allenby, 6 B. & C. 373. If the assignee's appointment is unknown to the holder notice to the

bankrupt is good. Donnell v. Lewis County Sav. Bank, 80 Mo. 165. It has been held that the insolvent is absolutely entitled to notice. House v. Vinton Nat. Bank, 43 Ohio St. 346. The personal representatives of a deceased indorser should receive all notices intended for his decedent. Oriental Bank v. Blake, 22 Pick. 206; Hallett v. Branch Bank, 12 Ala. 193.

Recent Decisions on the Subject.—It is not necessary that the notice itself be addressed, if the envelope containing it is properly addressed to the indorser, and he receives it through mail. Glicksman v. Earley (Wis.), 47 N. W. Rep. 272. Under Rev. Stat. Wis. Sec. 176, requiring that the notice shall be served by delivering a copy to the person entitled to such notice, or "by depositing it in the post-office · · · directed to him at the post-office at or nearest to his reputed place of business," depositing a copy in the post-office is sufficient service on either a resident or a non-resident indorser. Glicksman v. Earley (Wis.), 47 N. W. Rep. 272. The deposit of a notice of protest in a letter box on the street is in legal effect the same as depositing it in a box in the post-office. Johnson v. Brown (Mass.), 27 N. E. Rep. 994. The holder of a note testified that he enclosed a notice of protest thereof in an envelope, with a direction to return to the sender if not called for in so many days printed thereon, addressed the envelope to the indorser by street and number, and deposited it in the government mail box, and that the letter was never returned to him. Held, sufficient to charge the indorser. Manchester v. Van Brunt (City Ct. N. Y.), 19 N. Y. S. 685. Where plaintiff's notary, relying on a directory, mails to a wrong address notice of protest to an accommodation indorser, who does not receive it until 27 days later, when the notary redirects the notice to the correct address, and it appears that the notary could have readily ascertained the proper address at first by inquiry or by reference to a note in his possession, of which the one in question was a renewal, he failed to use due diligence, and the protest was not properly made. Bacon v. Hanna (Sup.), 17 N. Y. S. 430. An indorser testified that he had an office at 115 Broadway, New York, where he received his mail, but that he did not transact any business there. Held, that the office in question was the indorser's place of business, within the meaning of Laws 1857, ch. 416, Sec. 3, directing to what place notice of dishonor shall be sent to an indorser. People v. North River Bank (Sup.), 17 N. Y. S. 200; *In re* Manley, *Id.* 62 Hun, 484. In a city of less than 1000 inhabitants, not having free mail delivery and which is not within Code, Sec. 1777, permitting notice of dishonor to be given by mail, although the indorser and holder live in the same town, personal notice must be given. Isbell v. Lewis (Ala.), 13 South. Rep. 335. By the law merchant, personal notice of dishonor need not be given presently and directly to the indorser, but the notice may be left with any person in charge of his place of business, whether such is his agent or not, or with any person found on and belonging to the place where he resides, apparently capable of transmitting the notice to the indorser. Isbell v. Lewis (Ala.), 13 South. Rep. 335. Where a notary sent a protest of a note addressed to the indorser to the payee, whose book-keeper duly mailed it to the indorser, stamped, and with direction to return if not delivered in five days, and the letter was not returned, it was sufficient evidence that the notice was sent and received. Swampscott Machine Co. v. Rice (Mass.), 34 N. E. Rep. 520. The fact that notice of protest of a note was sent to the executors of a deceased party to a note, addressed as "administrators" is immaterial so long as they received it. Drexler v. McGlynn, 33 Pac. Rep. 773, 99 Cal. 143. Notice to an indorser of non-payment may be given by mail where the indorser and sender of the notice reside at different post-offices, and, if properly addressed and mailed, will charge the indorser, whether he has received it or not. Townsend v. Auld (City Ct. N. Y.), 28 N. Y. S. 746. If, at the maturity of commercial paper, the indorser is dead, and no personal representatives can be discovered by reasonable diligence, notice of dishonor should be addressed to the indorser, at his last place of abode; but when there are personal representatives, who are known, or discoverable by due diligence, notice mu t be given to them, or one of them. Dodson v. Taylor (N. J. Sup.), 28 Atl. Rep. 316. An executor named in a will, though not yet approved by the court, is a personal representative, within the meaning of Civil Code, Sec. 3145, providing that notice of a protest of a note may be given, in case of the death of a person otherwise entitled to notice, to one of his personal representatives. Drexler v. McGlynn, 33 Pac. Rep. 773, 99 Cal. 143.

BOOK REVIEWS.

BEACH ON INSURANCE.

This is the latest production of a most prolific and diligent writer. Not satisfied with giving to the profession valuable treatises on "Modern Equity Jurisprudence," "Modern Equity Practice," "Receivers," "Private Corporations," "Public Corporations," "Railways" and "Injunctions," he undertakes here to collect and state the present law of insurance, in all its phases, as defined by statute and declared especially by the later decisions of our State and Federal Courts and of the courts of England. The work embraces, Life, Fire, Marine, Accident and Casualty and Guaranty Insurance in every form. It discusses in an orderly and methodical manner the organization of insurance companies, both stock and mutual, and their rules and by-laws; the powers and duties of benevolent associations, the rights of their beneficiaries, and who are entitled as such. Accident and Casualty Insurance are also fully treated, including the mode of Procedure after Accidents. The guaranty of the integrity of employees is also fully presented, as well as that of Annuities and Tontine Insurance. Naturally the subject of Fire Insurance occupies the most space, commencing with the original application, and concealments or warranties therein, followed by the policy, its construction and effect, and the nature of the conditions therein. The doctrine of Other Insurance, Alienation, and Increase of Risk, is elaborately examined, the requisites of Insurable interest, etc. In Life Insurance the effect of self-destruction is discussed, and in Marine Insurance the many questions arising are carefully examined. The last few chapters are directed to methods of procedure, including Proof of Loss, the subject of arbitration, and of suits at law including the pleading, evidence,and recovery of damages. It is embraced in two large and handsome volumes with most exhaustive notes explaining, enlarging, and qualifying a text which in style is clear, terse and vigorous. The author seems to have had in mind substantially every question that can arise in the law of insurance and displays a diligence and accuracy in collecting precedents and authorities which is a praiseworthy feature of all his productions. It is plain to be seen that this treatise will readily become the leading authority on the law of its subject. The volumes are well indexed and beautifully printed and

bound. Published by Houghton, Mifflin & Co., Boston and New York.

BLACK'S CONSTITUTIONAL LAW.

The Hornbook series of handbooks, of which this is the latest issue, is fast obtaining a recognized and favorable place in legal literature. Students and the professors of law schools especially find them exceedingly valuable in giving reliable statements and a clear comprehension of the general principles of elementary law. The plan and scope of the present work may best be stated in the words of the author who says that it is "intended primarily for the use of students at law and instructors in the law schools and universities. It contains a condensed review of all the leading principles and settled doctrines of American constitutional law, whether arising under the federal constitution or those of the individual States. These principles and doctrines are stated in the form of a series of brief rules or propositions, numbered consecutively throughout the book, and are explained, amplified and illustrated in the subsidiary text and supported by the citation of pertinent authorities. The necessary limitation of space, as well as the purpose and plan of the work, have precluded any attempt at exhaustive discussion or minute elaboration of the great topics of constitutional law. But the book is believed to be comprehensive of the general subject and sufficiently detailed to equip the student with an accurate general knowledge of the whole field." Without going at length into its merits, we have no hesitation in pronouncing the work of Mr. Black as exceedingly well done. It is clear, accurate and forcible and cannot but impress the student of constitutional law with the belief that its author is a master of its subject. It is a volume of over six hundred pages well annotated and indexed, and is published by the West Publishing Co., St. Paul.

WILLIAMS ON EXECUTORS.

This treatise has been for more than twenty-five years a recognized authority, and though its English birth and adaptation has to some extent stood in the way of its general use in this country, it has been regarded by many practitioners here with great favor and partiality. The present jis the seventh American Edition. Its increased value in this country may be understood by the statement that the editors have added an American volume for American use, thus giving us a standard and able American English treatise on executors. Of the work of the American editors, nothing but words of praise can be used. They have diligently collected the authorities and clearly and concisely presented them. The work is in three large volumes, well executed in a mechanical point of view and has an admirable index. Published by Frederick D. Linn & Co., Jersey City, N. J.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATION — Appointment — Collateral Attack.—The fact that an administrator may have been appointed by the probate court of another county than that in which his intestate resided at his death renders the appointment voidable only, and it cannot be collaterally attacked.—KLING v. CONNELL, Ala., 17 South. Rep. 123.

2. ADMINISTRATION — Sale — Collateral Attack. — An administrator's sale of lands is void for want of jurisdiction, and may be impeached in a collateral action, where the children of the owner, under a misapprehension of the facts, admitted the allegation of the petition, that he was dead, and submitted to the decree, when such owner was in fact living at the date of the decree and sale.—SPRINGER v. SHAVENDER, N. Car., 21 S. E. Rep. 397.

3. ADMINISTRATION — Sale of Personalty. — In the month of June, 1884, K, administrator of R, sold land to F by order of court, and received one third of the purchase price in cash, and notes secured by mortgage at one and two years for the balance. In the month of March, 1887, after both notes were due, he indorsed, sold, and delivered the notes and assigned and delivered the mortgage to J, and received therefor the full face and interest of the notes in money, which he afterwards converted to his own use; but J had no notice of any bad faith or intended wrongful conversion of the proceeds of the notes, and the transaction was not such as to charge him with such notice. In an action by G, administrator *de bonis non* of the same estate, against J for the recovery of the notes and mortgage, held, that the sale of the notes and mortgage by K to J was valid, and passed title to him.—JELKE v. GOLDSMITH, Ohio, 40 N. E. Rep. 167.

4. ADMIRALTY — Shipping — General Average.—The law of general average is part of the maritime law, and not of the municipal law, and applies to maritime adventures only.—RALLI v. TROOP, U. S. S. C., 15 Sup. Ct. Rep. 656.

5. ADVERSE POSSESSION. — A father who had conveyed a portion of his land to his two sons, afterwards executed to them a deed to another portion, which recited that it was executed in lieu of the prior deed, due to a misdescription of the land in the former deed. The second deed was accepted by the sons, and the land therein conveyed subsequently sold. Held, that the possession of the father, after the execution of the second deed, of the land conveyed in the former, was adverse to the sons.—FOX v. WINDES, Mo., 30 S. W. Rep. 328.

6. ADVERSE POSSESSION—Estoppel.—Persons are not estopped to claim land by the fact that they permitted the person in possession to make improvements without asserting any adverse claim, the latter making the improvements with knowledge of their claim and expectation that it would be asserted.—COOPER v. GREAT FALLS COTTON MILLS CO., Tenn., 30 S. W. Rep. 353.

7. ALIMONY — Jurisdiction of Equity.—A court of equity, independent of statute, has jurisdiction to award alimony, even when no divorce is sought.—HANSCOM v. HANSCOM, Colo., 39 Pac. Rep. 885.

8. APPEAL.—Sess. Acts 1891, p. 70, authorizing an appeal from an order granting a new trial, and providing that the failure to so appeal shall not affect one's right to have the action of the court reviewed on an appeal from the final judgment, does not give one who fails to appeal from an order granting a new trial and participates in the new trial the right to have such order reviewed on appeal from the final judgment.—ESS v. GRIFFITH, Mo., 30 S. W. Rep. 343.

9. APPEAL—Effect of Former Decision.—The decision of the Appellate Court on a previous appeal is, on a second appeal on substantially the same facts, *res judicata*.—WRIGHT v. CARSON WATER CO., Nev., 39 Pac. Rep. 872.

10. APPEAL — Notice—Service.—Where nothing appears in the record to show the residence of appellee's attorney on admission by him of service of notice of appeal, it will be presumed that he was a resident of the county in which the trial was had, and that service was there made.—BENNETT v. MINOTT, Oreg., 39 Pac. Rep. 997.

11. APPEAL BOND — Married Woman as Surety.—Where, on appeal to the court of civil appeals, judgment is entered on a *supersedeas* bond on which a woman was surety, the Appellate Court has no jurisdiction to entertain a motion to set the same aside on the ground that, being a married woman, she was not liable on the bond, where the fact that she was a married woman does not appear in the record.—CRUGER v. MCCRACKEN, Tex., 30 S. W. Rep. 373.

12. APPLICATION OF PAYMENTS.—In the absence of any direction by a debtor as to the application of a payment made by him, the creditor can apply it upon whatever debt he pleases, and is not bound to apply it to a debt secured by a bond.—POST-INTELLIGENCER PUB. CO. v. HARRIS, Wash., 39 Pac. Rep. 965.

13. ASSIGNMENT OF CHOSES IN ACTION—Priorities.—Where two assignments of a chose in action, for valuable consideration, are made to different persons, the assignee who first gives notice of his claim to the debtor has the prior right, though the assignment to him is later in date than that to the other assignee.—METHVEN v. STATEN ISLAND LIGHT, HEAT & POWER CO., U. S. C. C. of App., 66 Fed. Rep. 113.

14. ASSIGNMENT OF SALARIES OF DEPUTY MARSHALS.—Assignments by United States deputy marshals of claims for their services before the amount has been placed to the marshal's credit in the treasury department are not unlawful, as being an assignment of interests in claims against the United States before their allowance, in violation of Rev. St. U. S. § 3477, as such claims are upon the marshal, and not upon the government.—WALLACE v. DOUGLAS, N. Car., 21 S. E. Rep. 387.

15. ASSIGNMENT FOR BENEFIT OF CREDITORS.—An insolvent debtor, previous to making an assignment for the benefit of his creditors, transferred to his father land the legal title to which he had previously accepted from him without consideration, under a contract to reconvey it at a stated time: Held, not a fraud on creditors.—PECK v. JONES, Tex., 30 S. W. Rep. 382.

16. ASSUMPSIT.—In an action for water furnished for irrigation and domestic purposes, evidence that it was furnished to defendants' grantor, that defendants under the deed assumed certain debts of the grantor, and took an assignment of a claim due him for grain sold, will not support an allegation that the water was furnished at defendants' special instance and request.—LITTLE KLAMATH WATER-DITCH CO. v. REAM, Oreg., 39 Pac. Rep. 998.

17. ATTACHMENT OF LAND—Abstract.—A failure of the sheriff to file an abstract of attachment of land as required by Rev. St. 1889, § 543, subd. 3, will render the attachment invalid.—BRYANT v. DUFFY, Mo., 30 S. W. Rep. 317.

18. AWARD AND ARBITRATION — Validity of Award.—Where it is manifest from the terms of a reference that the word "arbitrators" was applied to the umpire as well as to the two arbitrators named, an award, signed by one of the named arbitrators and the umpire followed by dissent therefrom, signed by the other named arbitrator, is within the terms of the reference, so far as being the award of the arbitrators is concerned.—SAVANNAH, F. & W. RY. CO. v. DECKER, Ga., 21 S. E. Rep. 372.

19. BAILMENT—Lease of Personal Property.—A clause, in a lease of personal property, providing that at its termination the lessee should "return said property in as good condition as it now is, usual wear excepted," does not make the lessee liable in damages, where the property has been destroyed by fire without fault on his part.—SEEVERS v. GABLE, Iowa, 62 N. W. Rep. 670.

20. BANKS—Receiving Deposits with Knowledge of Insolvency.—The provisions of Acts 18th Gen. Assem. ch. 153, §§ 1, 2, making it a felony for "any officer" of a bank to receive deposits with knowledge that the bank is insolvent, applies to officers of national as well as other banks.—STATE v. FIELDS, Iowa, 62 N. W. Rep. 653.

21. BANKS—Receiving Deposit When Insolvent.—Rev. St. 1878, § 4541, providing that any officer or agent of any bank or institution, or of any person, company, or corporation engaged in whole or in part in banking, or any person engaged in such business in whole or in part, who shall accept on deposit, or for safe-keeping, or to loan, any money, or any paper for collection, when he knows, or has good reason to know, that such bank, company, corporation, or person is unsafe or insolvent, shall be punished, etc., does not impair any banking right, and is therefore within the enacting power of the legislature, and does not require the vote of the people provided by Const. art. 11, § 5.—IN RE KOETTING, Wis., 62 N. W. Rep. 622.

22. CARRIERS—Delivery to Broker. — Where goods were shipped over the lines of connecting railways to a consignee designated in the bill of lading, and on arrival at destination the receivers of the railway company which completed the transportation tendered delivery to that consignee, and he declined to receive the goods, the liability of the receivers as common carriers thereupon ceased, and they became liable as warehousemen only, and as such were chargeable with the duty of notifying the consignor of the consignee's refusal to accept the goods, and with the further duty of holding the same subject to the order of the consignor.—AMERICAN SUGAR-REFINING CO. v. MCGHEE, Ga., 21 S. E. Rep. 383.

23. CARRIER—Live Stock—Damages. — In an action for breach of contract to furnish cars to carry cattle to market, whereby a delay was caused and the cattle lost in weight, the measure of damages is the difference between the market value of the cattle at the time of their arrival and their market value at the

time they should have arrived.—MISSOURI, K. & T. RY. CO. OF TEXAS v. DARLINGTON, Tex., 30 S. W. Rep. 250.

24. CARRIERS—Passenger—Negligence.—A passenger alighting from a moving train at the direction of the conductor is not, as a matter of law, guilty of contributory negligence, where there was no appearance of danger either in the locality where he alighted or the rate of speed of the train.—WATKINS v. RALEIGH & A. AIR-LINE R. CO., N. Car., 21 S. E. Rep. 409.

25. CARRIERS— Passengers—Negligence.— In an action against a railroad company for injury caused by the negligence of defendant in not providing "suitable steps for plaintiff's exit from a car," an instruction that, if the defendants provided such platform steps as "were ordinarily provided for similar cars," then it had satisfied the law, without regard to whether they were safe, is error.—DOUGHERTY v. KANSAS CITY & I. RAPID TRANSIT RY., Mo., 30 S. W. Rep. 317.

26. CARRIERS OF GOODS—Penalties—Refusal to Deliver Freight.—A bill of lading which, although specifying the rate per 100 pounds, and providing that the rates therein made are subject to correction, does not in terms purport to state the true weight, but merely refers by its number to the car in which the freight is shipped, does not contain sufficient *data* for a determination of the true freight charges, and will not support a suit by the shipper to recover the penalty prescribed by Rev. Civ. St. art. 4258*a*, where a carrier refuses to deliver goods upon the payment or tender of the freight charges due, "as shown by the bill of lading."—JOHNSTON v. FT. WORTH & D. C. RY. CO., Tex., 30 S. W. Rep. 260.

27. CARRIERS OF GOODS—Recitals in Bill of Lading.—A recital in a bill of lading that the contents of certain boxes are unknown, and "in apparent good order," does not make a *prima facie* case as against the carrier that the goods were in good order when received, and were injured during transportation, where they were not exposed to view, and the boxes were delivered in apparently the same condition as when received.—GULF, C. & S. F. RY. CO. v. HOLDER, Tex., 30 S. W. Rep. 384.

28. CONFLICT OF LAWS—Assignment for Creditors.—An assignment for the benefit of creditors, made in another State, under a statute providing that creditors shall receive no benefit under the assignment, nor any part of the debtor's estate, unless they first file a release of all claims other than such as may be paid under the assignment, will not be enforced in Iowa.—FRANZEN v. HUTCHINSON, Iowa, 62 N. W. Rep. 698.

29. CONSTITUTIONAL LAW—Act Authorizing Employment of Deputy.—An act of the legislature is presumed constitutional, and its conflict with the constitution must be clearly and unquestionably shown before it will be declared invalid. A deputy county clerk is not an "officer," within the meaning of Const. art. 11, § 5, requiring the legislature to provide for the election of county officers, to prescribe their duties, and to regulate their compensation.—NELSON v. TROY, Wash., 39 Pac. Rep. 974.

30. CONSTITUTIONAL LAW — Grand Jury— Witness.—Gen. St. § 91, authorizing grand jurors, when assembled to investigate offenses committed, to require a justice to commit to jail witnesses refusing to answer proper questions, is not unconstitutional, as authorizing the exercise by the executive department of a judicial power.—IN RE CLARK, Conn., 31 Atl. Rep. 522.

31. CONSTITUTIONAL LAW — Habitual Drunkards — Defective Title.—The treatment and cure of habitual drunkards constitute but one subject in Act 1894, ch. 274, the title to which states that it is "An act to provide for the treatment and cure of habitual drunkards;" and the act is not unconstitutional as containing two subjects in its title, whereas the body of the act mentions only the "treatment" and not the "cure" of drunkards.—MAYOR AND CITY COUNCIL OF BALTIMORE v. KEELEY INSTITUTE OF MARYLAND, Md., 31 Atl. Rep. 437.

32. CONTRACT—Agent.—A contract made by a person describing himself as agent cannot be admitted to bind the principal where there is no evidence of the agent's authority.—BADART v. FOULON, Md., 31 Atl. Rep. 514.

33. CONTRACT—Damages.—In an action for breach of contract to sell a store which plaintiff had entered under the contract, evidence as to the profits plaintiff realized from week to week during the time he carried on the business was admissible to show the value of the business lost by the breach.—COLLINS v. LAVELLE, R. I., 31 Atl. Rep. 484.

34. CONTRACT—Parol Evidence.—A provision, in a bond for title to an undivided interest in a mining claim, that the vendees are to pay the vendor one-sixth of the net proceeds of all shipments of ore, to be applied on the agreed price, is unambiguous; and parol evidence is inadmissible to prove that, according to a custom of miners, the expenses of mining as well as of shipping the ore should be deducted before such payments.—KEEFE v. DORELAND, Mont., 39 Pac. Rep. 917.

35. CONTRACT—Supplying Omissions.—Where a clause in a contract, having been left unfinished, is meaningless, the court will not supply supposed omissions to give it legal effect.—SINCLAIR v. HICKS, N. Car., 21 S. E. Rep. 395.

36. CONFESSION BY PLEDGEE.—A transfer of corporate stock by one to whom it has been hypothecated by a bank to which it had previously been pledged, made by order of its president before the maturity of the debt for which it was hypothecated, and without any price being fixed on for the stock or any agreement by the owners, does not constitute a sale of the stock, and the title thereto remains in the pledgee bank.—GREER v. LAFAYETTE COUNTY BANK, Mo., 30 S. W. Rep. 319.

37. CORPORATIONS—Action against Officers.—A complaint by corporate stockholders against an officer alleging that a majority of the directors are controlled by defendant, and that they fraudulently colluded with him in the control of the corporation, sufficiently shows the futility of a demand on the corporation to bring the action.—COWLES v. GLASS, Tex., 30 S. W. Rep. 293.

38. CORPORATIONS—Effect of Certificate under Seal.—It seems that, where a corporation is not required by law or by its by-laws to keep official minutes of the proceedings of the board of directors, neither such corporation, nor any one claiming under it, can go behind a resolution, certified by the secretary under the seal of the corporation, and show that such resolution was not, in fact, passed.—PRENTISS TOOL & SUPPLY CO. v. GODCHAUX, U. S. C. C. of App., 66 Fed. Rep. 234.

39. CORPORATIONS — Insolvency—Preferences to Directors.—A mortgage given by a corporation, while it is a going concern, though not having property sufficient at the market price to pay its debts, but while all concerned expect and intend that it shall continue, and believe that its continuance will bring financial success, though given to its directors, who are sureties on its notes, to secure them on account thereof, and to induce them to procure renewals or extensions of the notes, and to procure further advances of credit, is not invalid as to creditors of the corporation.—SANFORD FORK & TOOL CO. v. HOWE, BROWN & CO., U. S. S. C. 15 Sup. Ct. Rep. 620.

40. CORPORATION—Receiver.—A stockholder in a corporation is not entitled to have a receiver appointed, without notice, for such corporation, on the ground of disagreement among the stockholders as to the management of the business, no fraud or insolvency being shown.—LITTLE WARRIOR COAL CO. v. HOOPER, Ala., 17 South. Rep. 118.

41. ADVANCES FOR EXPENSES. — An assignment that "the court erred in not sustaining defendant's first, second, and third special exceptions pleaded in his second amended answer for the reasons in said exceptions stated," is too general, under the rules, to be considered.—COTTON v. COIT, Tex., 39 S. W. Rep. 281.

42. CREDITORS' BILL—Fraud—Partnership.—Upon a dissolution of partnership, S, the retiring member, sold his interest, on credit, to the new firm, which assummed the debts of the old; and it was agreed—the insurance company assenting—that a policy of insurance on the stock should remain in force, and in event of loss by fire a proportionate share of the insurance money should be paid S, upon his debt due from the new firm: Held, that the agreement as to the insurance money was not a fraudulent conveyance of the policy, so as to authorize pre-existing creditors to file a bill in chancery under Code, § 3544, to enforce their claims.—PORTER v. ULLMAN, Ala., 17 South. Rep. 111.

43. CRIMINAL EVIDENCE — Arson—Confessions.—The consent of a defendant to the amendment of an indictment to meet a variance in the proof being a matter of record, the terms of his consent are to be determined from the record, and not from a bill of exceptions.—STONE v. STATE, Ala., 17 South. Rep. 114.

44. CRIMINAL EVIDENCE — Confessions.—The proof disclosing that the confession of an accused was freely and voluntarily made, it is of no consequence that firearms were at the time deposited in the room where the parties were, though not exhibited to the defendants, they having been procured for a purpose altogether different from that of the intimidation of the accused.—STATE v. WATT, La., 17 South. Rep. 164.

45. CRIMINAL EVIDENCE — Larceny—Declarations.—Declarations of defendant, as to how he came into possession of the stolen property, made after he parted with the possession, are inadmissible.—WILLIAMS v. STATE, Ala., 17 South. Rep. 86.

46. CRIMINAL EVIDENCE—Murder—Dying Declarations.—It appeared that deceased lived seven months after being shot, and it did not appear that he had been told that he could not recover, but his sister testified that he said a short time before his death that "he could not get well," and that he "could not stand it much longer:" Held, that statements by deceased were not admissible as dying declarations.—STARR v. COMMONWEALTH, Ky., 30 S. W. Rep. 398.

47. CRIMINAL LAW—Assault—Illegal Seizure.—A person may use such force as is necessary to resist the seizure of his property under an execution against a stranger, and, if the officer persists in attempting the levy after being notified as to the ownership, he cannot defend an assault on the owner on the ground of self-defense, where the owner uses no more force than is necessary to prevent the levy.—SMITH v. STATE, Ala., 17 South. Rep. 107.

48. CRIMINAL LAW—Assault—Verdict.—An acquittal of assault with intent to inflict great bodily injury, by a finding of guilty of an assault only, is not in legal effect an acquittal of the lower degree of simple assault, on the ground that it is a practical finding that the blow admitted to have been struck was not unlawful, and a battery, and hence that there could have been no assault under the admitted facts.—STATE v. CODY, Iowa, 62 N. W. Rep. 702.

49. CRIMINAL LAW—Bigamy—Former Marriage.—On a prosecution for bigamy, evidence of reputation is not sufficient to prove the former marriage.—ADKISSON v. STATE, Tex., 30 S. W. Rep. 357.

50. CRIMINAL LAW — Carring Weapons. — Under the statute prohibiting the carrying of arms about the person, one cannot habitually carry a pistol between his residence and his place of business.—CHAMBERS v. STATE, Tex., 30 S. W. Rep. 357.

51. CRIMINAL LAW—Embezzlement — Bond of Indemnity.—An express agent charged with embezzlement cannot complain of a charge that a bond given by him to the company to indemnify it against any loss from defalcation or otherwise on his part may be looked to in mitigation of any punishment assessed against him, but not for the purpose of excusing the embezzlement.—SMITH v. STATE, Tex., 30 S. W. Rep. 236.

52. CRIMINAL LAW — False Pretense — Venue.—One who, under false pretenses, obtains goods ordered from a salesman, may be tried in the county from which the principal shipped them.—COMMONWEALTH v. KARPOWSKI, Penn., 31 Atl. Rep. 572.

53. CRIMINAL LAW—Homicide—Justification.—Where defendant's evidence tends to show that deceased came to his house armed, and, after breaking in the door, attempted by force and threats to compel defendant's wife to leave her husband and accompany him, it is error to fail to instruct that, if defendant had reasonable grounds to believe deceased was about to abduct his wife, he was justified in using such force as was apparently necessary to prevent such wrong, even to the taking of life.—SAYLOR v. COMMONWEALTH, Ky., 30 S. W. Rep. 390.

54. CRIMINAL LAW—Homicide—Self-defense.— Where deceased was killed while engaged, with others, in an attack on defendant, with sticks and clubs, an instruction withdrawing the question of self-defense from the jury, on the ground that sticks and clubs are not deadly weapons is erroneous. — ALLEN v. UNITED STATES, U. S. S. C., 15 S. C. Rep. 720.

55. CRIMINAL LAW——Information.—Under a statute providing that no information shall be filed for any felony until the person charged shall have had a preliminary examination and been held for trial, a prosecuting attorney can proceed by information only for the offense designated by the magistrate who holds the examination.—STATE v. BOULTER, Wyo., 39 Pac. Rep. 383.

56. CRIMINAL LAW—Lotteries.—Defendant owned and operated a device consisting of a circular board, in the center of which was an arrow, turning on a pivot, pointing to numbers around the edge of board. Opposite each number was placed an article of jewelry or a sum of money. One having paid for the privilege of whirling the arrow was entitled to the prize opposite the number on which it stopped: Held, a lottery.—REEVES v. STATE, Ala., 17 South. Rep. 104.

57. CRIMINAL LAW—Murder — Evidence. — Death by criminal violence having been proven by direct evidence, or proof of death being so strong as to produce moral certainty, the criminal agency may be established by circumstantial evidence.—NICHOLAS v. COMMONWEALTH, Va., 21 S. E. Rep. 364.

58. CRIMINAL LAW—Murder—Proof of Motive.—Where the court, at defendant's request, instructs the jury that they have a right to consider the absence of any proof of a motive for the crime, it is not error to qualify the same by stating that proof of a motive is not necessary to conviction.—JOHNSON v. UNITED STATES, U. S. S. C., 15 S. C. Rep. 614.

59. CRIMINAL LAW—Obscene Language.—On trial for violating Cr. Code, § 4031, prohibiting the use of obscene language in the presence or hearing of any female, where defendant used such language while riding on a public road, and it was heard by ladies traveling a short distance behind, it was proper to refuse to charge for acquittal if defendant did not know of their presence, or of any fact that would put a reasonable man on notice that there might be a female within hearing.—LANEY v. STATE, Ala. 17 South. Rep. 107.

60. CRIMINAL LAW—Rape.—A charge, in a trial for assault with intent to commit rape, that "the law presumes that a person intends the natural and probable consequences of his acts," followed by the direction to acquit the accused "unless the assault was made under such circumstances as show, beyond any reasonable doubt, that he intended to accomplish his purpose at all events," by force, was not prejudicial to the defendant.—STATE v. COURTEMARSHE, Wash., 39 Pac. Rep. 955.

61. CRIMINAL LAW—Warrant of Arrest—Validity.—A warrant for the arrest of some unnamed person is void unless it contains such a *descriptio personæ* as will supply the lack of the name by which the accused is known.—PRISK v. ALLISON, Colo., 39 Pac. Rep. 902.

62. CRIMINAL PRACTICE—Homicide— Venue.—An accused waives any error committed in denying his motion for a change of venue on the ground of local prejudice, where he is afterwards given an opportu-

nity to renew his motion, and he fails to call it up or ask the court to pass upon it at the time set for a hearing.—PEOPLE v. FREDERICKS, Cal., 39 Pac. Rep. 944.

63. CRIMINAL PRACTICE — Liquor Nuisance. — Since Code, § 1543, defines the offense of liquor nuisance as consisting in using for the prohibited purposes "any building, erection or place," an indictment for liquor nuisance charging the use of "a building, erection, place, and railroad car," charges two offenses.—STATE v. CHAPMAN, Iowa, 62 N. W. Rep. 659.

64. CRIMINAL PRACTICE—Rape — Indictment.—An indictment which contains two counts, one charging rape, the other carnal knowledge, of a female under 10 years of age, is not bad for duplicity.—GRIMES v. STATE Ala., 17 South. Rep. 184.

65. CRIMINAL TRIAL—Murder—Assistant Prosecutor. —It is not error for the trial judge to permit an attorney who is neither a resident nor a member of the bar of this State, but is a non resident of this State, and who is employed solely by relatives of the person for whose murder the accused is being tried, to assist the prosecuting attorney on the trial, the latter having requested the judge that such counsel be permitted to aid him in the case.—STATE v. KENT, N. Dak., 62 N. W. Rep. 688.

66. CRIMINAL TRIAL—Murder—Trial.—The prosecuting attorney may comment on defendant's failure to call as a witness his wife, who saw him kill her father, she being a competent witness for him, but incompetent for the State.—COMMONWEALTH v. WEBER, Penn., 31 Atl. Rep. 481.

67. DEED — Acknowledgment. — In the absence of fraud or duress, parol evidence is not admissible to impeach the certificate of acknowledgment of the wife to a conveyance of the homestead, voluntarily signed by her in the presence of a notary, although ignorant of his official character, with knowledge that her signature made in his presence was deemed essential.—JINWRIGHT v. NELSON, Ala., 17 South. Rep. 91.

68. DEED—Fee in Highway.—Where the description in a deed conveying land by metes and bounds carries the line along the side of a highway, though not mentioning it, and the grantor owns the fee to the center of such highway, a finding that a fee in the land to the center of the highway, subject to the public easement therein, passed to the grantee, in the absence of words in the deed showing a different intention, will not be disturbed.—GRANT v. MOON, Mo., 30 S. W. Rep. 328.

69. DEED AS MORTGAGE.—In an action to set aside a deed by a corporation, it appeared that the corporation was in need of money; that its manager executed a note payable to the corporation, and due in 90 days, which was discounted by defendant at a large discount. When the note became due it was not paid, and the deed in question was then made to defendant, the manager at the time agreeing to procure defendant a purchaser for the lots therein conveyed: Held, that the transaction was a loan, and the deed merely executed as security.—MONTGOMERY v. BEECHER, N. J., 31 Atl. Rep. 451.

70. DEED OF TRUST — Payment of Note Secured.— Where a note was secured by a trust deed, evidence that the debtor and another gave the creditor a second promissory note for a less amount will not, in the absence of an express mutual agreement to that effect, extinguish the debt evidenced by the earlier note, the presumption of payment arising from the delivery and cancellation of the former note being overcome by direct evidence that such was not the understanding of the parties.—SAVINGS & LOAN SOC. v. BURNETT, Cal., 39 Pac. Rep. 922.

71. DELIVERY—Escrow.—A deed delivered in escrow that is fraudulently abstracted from the depositary by the grantee without performing the conditions on which it was to be delivered to him is void even in the hands of a *bona fide* purchaser of the land.—JACKSON v. LYNN, Iowa, 62 N. W. Rep. 704.

72. DEED — Description — Boundary by Street.—The description in a deed was as follows: "Beignning at the southeast corner or intersection of H and G streets, and running thence easterly, bounding on G street, 25 feet; then southerly, parallel with H street, 80 feet, to an alley; then westerly, bounding on said alley, to H street, 25 feet; and thence northerly, bounding on H street, to the place of beginning:" Held, that "the southeast corner" of H and G streets was the point of intersection of the east side of H street and the south side of G street, and no part of the roadbed of H street passed by the deed.—RIEMAN v. BALTIMORE BELT. R. CO., Md., 31 Atl. Rep. 444.

73. DIVORCE — Community Debts.—A decree of divorce in favor of a wife, awarding to her under Civ. Code, § 146, all the community property of herself and husband, who has no separate estate, does not cut off the rights of one who has previously furnished her husband with groceries and provisions for his family upon the faith of his possession and ownership of such property to have it subjected to the payment of his debt in an action in the nature of a creditor's bill. —FRANKEL v. BOYD, Cal., 39 Pac. Rep. 939.

74. DIVORCE—Cruelty—Evidence.—In a suit for divorce for cruelty, plaintiff's father testified that his daughter came to his house, and told him that she had to leave defendant, and could not live with him longer, as he had threatened to shoot her: Held, inadmissible as *res gestæ*, the existence of the main fact to which they were supposed to relate not having been otherwise established.—HUTH v. HUTH, Tex., 30 S. W. Rep. 240.

75. DOWER—Deed of Right of Way.—A widow has no dower in land which her husband, by an absolute deed, in which she did not join, conveyed for a right of way. —CHOUTEAU v. MISSOURI PAC. RY. CO., Mo., 30 S. W. Rep. 299.

76. DOWER—Devise in Lieu.—Testator, after devising a tract of land to each of his two nephews, provided that one of them should keep together his entire property, and support his wife during her life or widowhood out of the proceeds, and also gave the wife all cash on hand at testator's death: Held, that the provisions for the wife were not in lieu of dower in the lands devised the nephews.—RIVERS v. GOODING, S. Car., 21 S. E. Rep. 310.

77. DOWER—Lands Taken for Railroad Purposes.— Under 1 Rev. St. 1889, § 2734, providing that in condemnation proceedings by railroads the owners of the land to be condemned shall be made parties defendant, and that it shall not be necessary to make any persons parties defendant in respect to their ownership unless they are either in actual possession of the premises or have title to the premises appearing of record, a widow is not entitled to dower in her husband's lands conveyed by him alone to a third person, and acquired by a railroad company for its right of way, either by condemnation proceedings against the husband's grantee or by conveyance from him.—BAKER v. ATCHISON, T. & S. F. R. CO., Mo., 30 S. W. Rep. 301.

78. ELECTION—School District.—A vote of the majority of those present at an adjournment of an annual school meeting, in favor of refunding the bonded indebtedness of the school district, is valid, although the voters in favor of the bonds were not a majority of the voters of the entire district or of those who were present at the regular annual meeting, under Sess. Laws, 1893, ch. 10, § 1, authorizing the directors of school districts to issue such bonds, provided the qualified electors of the district shall so determine at any regular or special meeting.—MILLER v. SCHOOL DIST. NO. 3 IN CARBON COUNTY, Wyom., 39 Pac. Rep. 879.

79. EQUITY — Bill of Discovery — Corporation.—The fact that all the officers of a corporation are competent witnesses for either party in a suit is not a reason for refusing to sustain a bill of discovery against the corporation.—CONTINENTAL NAT. BANK v. HEILMAN, U. S. C. C. (Ind.), 66 Fed. Rep. 184.

80. EQUITY—Counsel Fees—Payment.—Where counsel are employed to collect tax bills by a trustee appointed on the death of the county treasurer, equity will not compel payment of the attorney's fees from funds collected, the counsel's claim being merely one of contract, for which he has a remedy at law.—CHEW v. PERKINS, Md., 31 Atl. Rep. 507.

81. EQUITY—Demurrer.—A bill for relief and discovery must, as against a general demurrer, present such a case as will entitle complainant to some part of the relief independent of the discovery.—MEYERS v. SCHUMAN, N. J., 31 Atl. Rep. 461.

82. EQUITY—Establishment of Lost Deed.—A due regard to individual rights, as well as sound policy, requires that, in cases of the establishment of lost instruments, the proof as to the contents, or the substance of the contents, of the operative parts of such instruments, should be clear and satisfactory.—FRIES v. GRIFFIN, Fla., 17 South. Rep. 66.

83. EQUITY — Jurisdiction — Possession of Land.—While a suit in equity cannot be maintained by the holder of a legal title to recover possession of land, though coupled with a demand for an accounting as to rents and profits, or for the removal of clouds upon the title, yet, where the bill presents a case of fraud or mistake, or sets up a right to redeem from a mortgage, and it appears that the complainant has not an adequate and complete remedy at law, it may be maintained and possession of the land may be decreed.—HUDSON v. RANDOLPH, U. S. C. C. of App., 66 Fed. Rep. 216.

84. EQUITY — Multifariousness.—A bill to enjoin a party from securing any title to the land in controversy, under his deed, on the ground of estoppel, and to cancel the deed as in fraud of creditors, is demurrable; the rights under the two claims being inconsistent, and the relief different.—HEINZ v. WHITE, Ala., 17 South. Rep. 184.

85. EVIDENCE — Book Account.—An account in the ledger, which does not purport to be a book of original entries, is not, by itself, competent to prove an indebtedness.—IN RE HUSTON'S ESTATE, Penn., 31 Atl. Rep. 553.

86. EVIDENCE — Notice to Produce Instrument.—A party who fails or refuses upon due notice to produce an instrument in his possession is precluded from thereafter introducing secondary evidence of its contents, or from introducing the instrument itself, on his own behalf, notwithstanding the case may have been referred to the master to take and report all the testimony in the case.—POWELL v. PEARLSTINE, S. Car., 21 S. E. Rep. 328.

87. EXECUTION — Exemptions — Insurance Policy.—Money paid under an insurance policy on property exempt to a householder is itself exempt. — PUGET SOUND DRESSED BEEF & PACKING CO. v. JEFFS, Wash., 39 Pac. Rep. 962.

88. FEDERAL COURTS — Jurisdiction. — The federal courts have no jurisdiction of a suit to set aside a decree of a State court, on the ground that such decree is utterly void when tested by an inspection of the record, since in such case a motion, appeal, or bill of review, in the court which made the decree, is the proper and sufficient remedy.—LITTLE ROCK JUNCTION RY. v. BURKE, U. S. C. C. of App., 66 Fed. Rep. 88.

89. FEDERAL COURT—Jurisdiction of Supreme Court.—A writ of error to a State Supreme Court cannot be maintained where the record shows that, although a federal question was raised, there was yet an independent question, not federal in character, decided by the State court, which was in itself broaded enough to sustain the judgment.—WINTER v. CITY COUNCIL OF MONTGOMERY, U. S. S. C. 15 Sup. Ct. Rep. 649.

90. FRAUDS, STATUTE OF—Oral Lease.—An oral lease, under which possession is taken, and monthly rent paid for two years, is not a contract for the sale of an interest in land, within the statute of frauds.—EUBANK v. MAY & THOMAS HARDWARE CO., Ala., 17 South. Rep. 109.

91. FRAUDS, STATUTE OF — Parol Evidence. — Two or more papers, executed as parts of one transaction involving the sale of personal property, which was not delivered or paid for, may be construed together to ascertain whether the transaction is within the statute of frauds.—AMERICAN OAK LEATHER CO. v. PORTER, Iowa, 62 N. W. Rep. 658.

92. FRAUDULENT CONVEYANCE.—An agreement between a saloon keeper and a merchant selling him goods that, in case he becomes insolvent, he will turn over his stock of goods to the merchant, is void as against creditors, as in direct contravention of the insolvent act.—CHEVALIER v. COMMINS, Cal., 39 Pac. Rep. 929.

93. FRAUDULENT CONVEYANCE—Action to Set Aside.—The grantee of a judgment creditor who purchased at the execution sale cannot sue to set aside as fraudulent a deed made by the judgment debtor prior to the sale.—HELDEN v. HELLEN, Md., 31 Atl. Rep. 506.

94. FRAUDULENT CONVEYANCE—Evidence.—On an issue as to whether a conveyance of personal property was fraudulent as against creditors, evidence that after the alleged sale the purchaser went to another State, and that the seller remained in possession and apparent control of the property, is admissible to show fraudulent intent on the part of the seller.—ASHCROFT v. SIMMONS, Mass., 40 N. E. Rep. 171.

95. FRAUDULENT CONVEYANCE—Husband to Wife.—The statute of fraudulent conveyances does not apply to a conveyance made by a debtor husband solely for the purpose of transferring to the wife property held in trust for her.—DE BERRY v. WHEELER, Mo., 30 S. W. Rep. 338.

96. FRAUDULENT CONVEYANCE—Preference by Debtor.—A conveyance of property by a debtor in payment of a debt, thereby leaving nothing for his other creditors, is valid, whatever be the motives of the parties, provided the debt is *bona fide* and enforceable, the payment absolute, and, if made in property, not materially in excess of the debt, and no pecuniary benefit is secured to the debtor.—BRAY v. ELY, Ala., 17 South. Rep. 180.

97. FRAUDULENT CONVEYANCE—Wife as Grantee.—In an action to set aside a conveyance made by an insolvent husband to his wife, the latter claiming that she had no knowledge of the insolvency, and that the property was conveyed to her in payment of an existing debt, she may properly be questioned relative to her knowledge of, and the consideration given for, previous transfers by the husband to her during the existence of such debt.—TRUMBULL v. HEWITT, Conn., 31 Atl. Rep. 492.

98. GARNISHMENT — Jurisdiction — Exceptions.—As exemption laws have no extraterritorial force, a garnishee will not be discharged merely because the wages sought to be reached by garnishment were earned in another State, under whose laws they are exempt.—ATCHISON, T. & S. F. R. CO. v. MAGGARD, Colo., 39 Pac. Rep. 985.

99. GARNISHMENT OF ASSIGNEE OF DEBTOR. — One who receives property of a debtor under an understanding by which he is to hold it as trustee in fraud of the debtor's creditor's may be garnished for the amount thereof.—MILLAR & CO. v. PLASS, Wash., 39 Pac. Rep. 956.

100. HABEAS CORPUS—Constitutionality of Act.—On a petition for a *habeas corpus* alleging that the petitioner was unlawfully detained in custody under process issued by a county court, and that the court had no jurisdiction to issue the process, because the act of the legislature creating the court was in conflict with provisions of the constitution, the constitutionality of the creation of said court is a proper subject of inquiry. —EX PARTE PITTS, Fla., 17 South. Rep. 76.

101. HOMESTEAD—Assignment.—Where the value of the homestead assigned to an execution debtor, consisting of all his lands in the county of his residence, is less than $1,000, as allowed by Const. art. 10, § 2, he

his whole exemption $1,000.—SPRINGER v. COLWELL, cannot require an additional assignment of lands owned by him, in another county, to make the value of N. Car., 21 S. E. Rep. 301.

102. HUSBAND AND WIFE—Agreement to Separate.—A contract whereby a husband and wife agree to live apart—the wife to have the custody of their child, and to receive a certain amount per month from the husband, and releasing the respective claims of each in the property of the other—cannot be revoked by the husband, under Civ. Code, § 101, declaring that consent to a separation is a revocable act, and if one of the parties afterwards, and in good faith, seeks a reconciliation, but the other refuses, such refusal is a desertion.—SARGENT v. SARGENT, Cal., 39 Pac. Rep. 981.

103. HUSBAND AND WIFE—Community Property.—The separation of property obtained by the wife dissolves the community. Her renunciation of it is presumed unless she accepts, and the acceptance must be within the time allowed the wife divorced, or separated from bed and board.—HEFNER v. PARKER, La., 17 South. Rep. 207.

104. HUSBAND AND WIFE—Estoppel of Wife.—A wife is not estopped from asserting her title to the possession of her personal property mortgaged by her husband without her consent, to pay or secure his debt, because she did not seek out the mortgagee, and inform him of her title.—ROBERTS v. TRAMMEL, Ind., 40 N. E. Rep. 162.

105. HUSBAND AND WIFE—Payment of Wife's Money.—A husband, acting as the general agent of his wife, cannot direct payments which he makes with her money to be applied to his debts.—GLEATON v. TYLER, S. Car., 21 S. E. Rep. 333.

106. HUSBAND AND WIFE—Purchase of Land by Wife.—Const. art. 10, § 6, providing that the property of any female, whether acquired before or after marriage, shall be her separate estate, which she may devise or bequeath as if she were a *feme sole*, abrogates the common-law right of a married woman to disaffirm a purchase of land.—MCANALLY v. HEFLIN, Ala., 17 South. Rep. 87.

107. INJUNCTION — Dissolution — Damages.—On the dissolution of an injunction enjoining a judgment creditor, on the ground of his insolvency, from collecting a judgment recovered in another action, sued out in an action by the judgment debtor to recover a claim against the judgment creditor, the injunction having been dissolved because of the debtor's failure to recover on his claim, the judgment creditor is not entitled to recover, as damages, attorney fees paid for an unsuccessful attempt to procure the dissolution of the injunction before the final hearing on its merits of the judgment debtor's claim.—GARLINGTON v. COPELAND, S. Car., 21 S. E. Rep. 316.

108. INJUNCTION — Parties.—A bridge company, to whom a county has contracted to deliver bonds in payment for a county bridge, is a necessary party to a suit by the taxpayers to enjoin the issue of such bonds.—KING v. COMMISSIONERS' COURT OF THROCKMORTON COUNTY, Tex., 30 S. W. Rep. 257.

109. INJUNCTION RESTRAINING ACTION AT LAW.—An injunction will not lie, at the suit of a life insurance company, to restrain pending actions at law on policies issued by it, on the ground that they were obtained by fraud, and that the assignments thereof to defendant were also fraudulent, and made without consideration, as the company has an adequate remedy at law.—HOME LIFE INS. CO. v. SELIG, Md., 31 Atl. Rep. 503.

110. INSANE PERSON—Substitution of Guardian.—The mere appointment of a guardian for one who becomes insane pending suit does not divest the insane person of the right to the cause of action, or entitle the guardian to be substituted as plaintiff.—DIXON v. GRIES, Cal., 39 Pac. Rep. 857.

111. INSURANCE—"Mortgagee Clause."—The so-called "New York Standard Mortgagee Clause" in a policy of fire insurance which declares, in substance, that no act or neglect of the mortgagor shall defeat the insurance as to the interest of the mortgagee, does not dispense with making the proof of loss stipulated for in the policy, and within the time stipulated. If the mortgagee would not have the right in all cases to furnish the proof, he certainly would have it in a case in which the mortgagor refused; but in every case, unless waived by the underwriter, it must be furnished by one or the other.—SOUTHERN HOME BUILDING & LOAN ASS'N v. HOME INS. CO. OF NEW ORLEANS, Ga., 21 S. E. Rep. 375.

112. INSURANCE COMPANY—Failure to File Certificate.—Act April 4, 1887, providing that if any foreign corporation fail to file a certificate designating a resident agent and its principal place of business, all its contracts with citizens of Arkansas shall be void as to it, does not affect contracts made in Arkansas between foreign corporations.—ST. LOUIS, A. & T. RY. CO. v. FIRE ASS'N OF PHILADELPHIA, Ark., 30 S. W. Rep. 350.

113. INSURANCE POLICY—Issue by Agent.—An insurance policy issued by an agent of the company to a corporation of which he is a stockholder and officer is void.—GREENWOOD ICE & COAL CO. v. GEORGIA HOME INS. CO., Miss., 17 South, Rep. 83.

114. INTOXICATING LIQUORS—Illegal Sale—Evidence.—Upon the trial for maintaining a liquor nuisance, it was shown that intoxicated persons had been seen on defendant's premises; that whisky was discovered in an adjoining building, the key of which was found in defendant's house. Evidence was offered by the State to show that defendant's daughter was seen going to the adjoining house, and returned with something hidden under her dress; that an officer seized this object from the outside, and found it in size and shape like a quart bottle; that he asked to see it, and that defendant would not permit him: Held, admissible notwithstanding the way in which the officer got his knowledge of the object concealed. — COMMONWEALTH v. WELCH, Mass., 40 N. E. Rep. 104.

115. JUDGMENT—Assignee—Set-Off.—Where an assignment of part of a judgment was entered upon the entry of the judgment, and thereafter the judgment was set off against another without notice to the assignee, it was proper to reopen the matter, and grant the assignee a hearing.— IN RE WELLS, S. Car., 21 S. E. Rep. 334.

116. JUDGMENT AGAINST MARRIED WOMAN.—A judgment against a married woman not doing business as a *feme sole*, rendered on a note in which her husband did not join, is void.—HOFFMAN v. SHUPP, Md., 31 Atl. Rep. 505.

117. JUDGMENT AGAINST A DECEDENT—Collateral Attack.—Where, in proceedings to foreclose an assessment, the person named in the complaint as defendant and owner of the property is dead, a decree based on a summons against him is void, and therefore may be collaterally attacked.—GREENSTREET v. THORNTON, Ark., 30 S. W. Rep. 347.

118. JUDGMENT BY CONFESSION—Validity. — A judgment entered against a firm upon confession of one partner is void.—BUCHANAN v. SCANDIA PLOW CO. OF ROCKFORD, Ill., Colo., 39 Pac. Rep. 899.

119. JUDGMENT BY DEFAULT—Vacation.—Where defendant's attorney, relying on information received from the clerk that no business would be transacted by the court until after a certain date, gave no further attention to his demurrer then pending until such date, and it was overruled, and default entered, defendant's negligence was excusable, and the default properly opened.—ANACONDA MIN. CO. v. SAILE, Mont., 29 Pac. Rep. 910.

120. JUDGMENT LIEN—Community Property.—The fact of a recordation of a special mortgage, executed by the surviving member of the community, on community property, to secure his separate debt, cannot have the effect of preventing the sale of the property, to satisfy a judgment against the community, because the price bid for it is not sufficient to pay the special mortgage. In

such a case the judgment has priority, not by the fact of prior recordation, but because of the nature of the debt.—HEALEY V. ASHBEY, La., 17 South. Rep. 195.

121. JUDICIAL NOTICE.—The court will not take judicial notice of the contents of city ordinances.—SHANFELTER V. MAYOR, ETC., OF BALTIMORE, Md., 31 Atl. Rep. 439.

122. LANDLORD AND TENANT—Waiver.—Where a landlord accepts the note of his tenant, secured by his mortgage, in which is included rent due, and also other items, and part of the mortgaged property is sold, and the proceeds applied in part payment of the note, the landlord will be presumed to have waived his lien for the rent, and to rely exclusively on the tenant's personal responsibility.—SMITH V. DAYTON, Iowa, 62 N. W. Rep. 650.

123. LANDLORD'S LIEN—Ratification.—Where persons converted property on which a landlord had a lien for rent, the latter's failure to repudiate their action, or to reply to their letter proposing to pay for what they had appropriated, was not a ratification of their act.—MCCARTHY V. ROSWALD, Ala., 17 South. Rep. 120.

124. LANDLORD'S LIEN—Conversion by Mortgagee.—A mortgagee of a chattel, who removes it from a tenant's house, and converts it to his own use, knowing that the landlord has a lien for rent on the half interest of the tenant in the chattel, is liable to the land lord in damages.—SHEPHERD V. TAYLOR, Ala., 17 South. Rep. 88.

125. LIBEL—Justification.—Under Code Proc. § 212,—which provides that defendant may allege both the truth of the matter charged, and any mitigating circumstances, and that, whether he prove the justifica tion or not, he may give in evidence the mitigating circumstances,—the truth of a publication libelous on its face is available of a complete defense, whether pleaded in justification or in mitigation of damages.—HAYNES V. SPOKANE CHRONICLE PUB. CO., Wash., 39 Pac. Rep. 969.

126. LIEN—Contract of.—A lien for the price of a windmill, reserved by the contract for the sale, on the property whereon it was erected, is valid, between the parties, though not recorded in the mechanic's lien book.—PHELPS & BIGELOW WINDMILL CO. V. PARKER, Tex., 30 S. W. W. Rep. 365.

127. LIMITATIONS — Commencement of Action.—Under Rev. St. 1889, § 2013, which declares that the filing of a petition in a court of record and the suing out of process therein shall be deemed the commencement of a suit, a suit is begun from the time the petition is filed.—MCGRATH V. ST. LOUIS, K. C. & C. R. CO., Mo., 30 S. W. Rep. 528.

128. LIMITATION OF ACTION—Fraudulent Conveyance.—An action to set aside alleged fraudulent conveyances of land, not brought until four years after discovery of the fraud, is barred, under Gen. St. 1883, § 2174, limiting the time for bringing such an action to three years, where a judgment previously recovered by plaintiff on the same cause of action was reversed on appeal, and the new action was not commenced within one year thereafter, as required by section 2180.—ARNETT V. COFFEY, Colo., 39 Pac. Rep. 894.

129. LIMITATION OF ACTIONS—Guaranty.—The payment by the principal debtor of interest on a guaranteed claim before the claim is barred by limitation extends the statute as to the guarantor, there being no contract to the contrary.—HOOPER V. HOOPER, Md., 31 Atl. Rep. 508.

130. MALICIOUS PROSECUTION— Probable Cause.—In order that a plaintiff may maintain an action for malicious prosecution, three things must concur: (1) The suit must have terminated, after trial of its merits, in favor of the accused; (2) the motive must have been malicious; (3) the suit must have been instituted without any probable cause. — BROWN V. VITTUR, La., 17 South. Rep. 193.

131. MANDAMUS TO COUNTY OFFICERS.—Where the commissioners' court, after once fixing the salary of the county judge, made a second order reducing it, and on account thereof the county commissioner refused to approve the judge's demand for salary under the first order, and the county clerk refused to issue a warrant therefor, *mandamus* will not lie to compel such officers to perform those acts, since the performance thereof would involve the exercise of discretion.—ORR V. DAVIS, Tex., 30 S. W. Rep. 249.

132. MANDAMUS TO COUNTY TREASURER.—*Mandamus* will lie against a county treasurer to enforce payment of warrants drawn by order of the county commissioners upon an existing and sufficient fund.—BEENEY V. IRWIN, Colo., 39 Pac. Rep. 900.

133. MASTER AND SERVANT — Assumption of Risks.—Where plaintiff went into defendant's employ as car inspector, after stating that he would not unless furnished with a proper signal to protect him while under the cars, on the promise that the signal should be fur nished, but before it arrived he was injured by the backing of a train against a car which he was working, defendant is not liable, plaintiff having assumed the risk.—MAREAN V. NEW YORK, S. & W. R. CO., Penn., 31 Atl. Rep. 562.

134. MASTER AND SERVANT — Assumption of Risk.—Plaintiff, a minor of average intelligence, 18 years of age, while employed in loading dirt on a flat by means of a wheelbarrow which he was required to wheel over a narrow timber which bridged a deep cut, was injured by falling from the timber, on account of his barrow running off. The barrow did not run true on its axle, but plaintiff was aware of the fact: Held, that he assumed the risk of such injuries, and could not recover therefor.—CASEY V. CHICAGO, ST. P., M. & O. RY. CO., Wis., 62 N. E. Rep. 624.

135. MASTER AND SERVANT—Dangerous Machinery—Negligence.—The fact that a sawmill hand requested the manager, after he had been for some time employed as an oiler, to retain him in that capacity, does not show that he represented himself as competent for such work, and assumed all risk, there being no evidence that he was retained at such work on account of his request.—GUINARD V. KNAPP, STOUT & CO. COMPANY, Wis., 62 N. W. Rep. 625.

136. MASTER AND SERVANT—Dangerous Premises.—A coal miner has the right to assume, in the absence of apparent defects, that a room in which he is ordered to work by the mine boss is safe, and he is not bound to inspect it for the purpose of discovering latent defects.—ISLAND COAL CO. V. RISHER, Ind., 40 N. E. Rep. 158.

137. MASTER AND SERVANT—Defective Railroad Track.—It will not be presumed, as a matter of law, that a conductor on a train has acquired, from running over the route, knowledge of defects in the roadbed, consisting of broken ties and lack of ballast.—LOUISVILLE, E. & ST. L. CONSOLIDATED R. CO. V. MILLER, Ind., 40 N. E. Rep. 116.

138. MASTER AND SERVANT — Employment of Physician by Master.—Where a railroad voluntarily employs a physician for its injured employee, it is only bound to exercise reasonable care in selecting a competent person, and is not liable for the physician's negligence or tortious acts while attending the employee.—PITTSBURG, C. C. & ST. L. RY. CO. V. SULLIVAN, Ind., 40 N. E. Rep. 138.

139. MASTER AND SERVANT—Injuries—Necessity of Inspection.—In an action against a quarryman by an employee for injuries caused by the defective condition of an "exploder" used by plaintiff in discharging a dynamite blast, it appeared that the exploders were manufactured by one of the largest manufacturers in the county; that they were packed in boxes, ready for use by the quarrymen; that in order to inspect them it would have been necessary to employ an expert at great expense: Held, that defendant was not required to have the exploders inspected before delivering them to his employees for use.—SHEA V. WELLINGTON, Mass., 40 N. E. Rep. 173.

140. MASTER AND SERVANT—Injury to Employee—Action by Parent.—A plaintiff suing for injuries received by his minor son while in the employ of defendant is not bound by a recital in a receipt for the son's wages, signed by another at the son's request, that a party other than defendant was the employer.—SHMIT v. DAY, Oreg., 39 Pac. Rep. 870.

141. MASTER AND SERVANT — Negligence of Fellow-servant.—The liability of injury by a fellow-servant, assumed by one entering another's service, does not depend upon gradations in employment, unless the superiority of the person causing the injury was such as to put him in the category of principal or vice-principal.—NORFOLK & W. R. CO, v. NUCKOLS' ADM'R, Va., 21 S. E. Rep. 341.

142. MECHANIC'S LIEN — Amendment of Answer. — In an action to enforce a mechanic's lien, where defendant set up a written, contract, and failure of performance by plaintiff, if it appears that essential elements of the contract where oral, defendant may amend his answer by inserting them.—MANNERS v. FRASER, Colo., 39 Pac. Rep. 889.

143. MECHANIC'S LIEN—Foreclosures.—In an action by a subcontractor to foreclose a mechanic's lien based on the claim that the contractor has been fully paid in advance of the terms of his contract, the owner, though admitting that he has overpaid the contractor, and accepted the work unfinished, may make the contractor a party to the suit, and have his claims against such owner determined therein. — HINTON BRIDGE CONST. CO. v. NEW YORK CENT. & H. R. R. CO., N. Y., 40 N. E. Rep. 86.

144. MECHANIC'S LIEN—Priority to Mortgage.—Chapter 88 of the Laws of 1890 gives a person who performs labor upon or furnishes the materials for a threshing engine at the request of the owner thereof a lien thereon prior to the lien of a mortgage thereon, duly filed, although such mortgage lien existed at the time such work was done or such materials were furnished, provided such person perfects such lien as required by the statute. Such lien is valid.— GARR v. CLEMENTS, N. Dak., 62 N. W. Rep. 640.

145. MINES AND MINING—Right to Follow Dip.—A controversy arising from overlapping locations, after being carried on both before the land office and the courts, was compromised by allowing one of the locations to patent most of the disputed land. A company was then organized, representing both parties to the dispute, and the land was conveyed to it: Held, that this company could not refer its title to either or both of the contending locations, at its election, so as to give it the right to follow the dip within the end lines of their location at will, but, on the contrary, it must derive its rights in this respect solely from the location under which the patent was obtained. — DEL MONTE MINING & MILLING CO. v. NEW YORK & L. C. MIN. CO., U. S. C. C. (Colo.), 66 Fed. Rep. 212.

146. MONOPOLIES—Ferry Franchise and Bridge Privileges.—The city of Laredo, Tex., owning a ferry franchise over the Rio Grande river, granted to it at an early day by the Spanish government, contracted, by ordinance, with a bridge company to permit the erection of the north end of a bridge in certain of its streets, and agreed not to exercise its ferry franchise for a period of 25 years, in return for which it was to receive $5,000 per year for the same period: Held, that this ordinance did not create a monopoly, within the meaning of the Texas constitution (article 1, § 26), which declares that "perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed."—CITY OF LAREDO v. INTERNATIONAL BRIDGE & TRAMWAY CO., U. S. C. C. of App., 66 Fed. Rep. 246.

147. MORTGAGES—Acquisition by Owner of Equity—Merger.—One D purchased the furniture of an hotel, upon which there were two chattel mortgages, which D assumed and agreed to pay. D afterwards sold the furniture to H, subject to the chattel mortgages. H caused the first mortgage to be bought in by one F, with money furnished by H, and to be foreclosed, H buying the property, and thereafter claiming to hold it discharged from the second mortgage: Held, that inasmuch as the mortgages were treated as part of the consideration in the contract of sale between D and H, the first mortgage was in legal effect satisfied when H purchased it through his agent, and he was not thereafter entitled to assert it as a subsisting lien upon the furniture.—KILPATRICK v. HALEY, U. S. C. C. of App., 66 Fed Rep. 133.

148. MORTGAGE—Security for Husband's Debt. — A mortgage given by a wife, upon her separate property, to one who is cosurety with her husband, on a note upon which the latter may be held as principal, is within the prohibition of Code, § 2349, which declares that the wife shall not become surety for the husband.—MCNEIL v. DAVIS, Ala., 17 South. Rep. 101.

149. MORTGAGE FORECLOSURE— Redemption. — One who purchases mortgaged premises at a foreclosure sale, and takes possession and leases them to another, cannot be required to account, in a suit by the mortgagor to redeem, for the rents and profits from the time of the sale until the redemption.—HARDY v. HERRIOTT, Wash., 39 Pac. Rep. 359.

150. MUNICIPAL CORPORATION — Change of Street Grade.—A charge directing the jury, in estimating the damage caused to property by lowering the grade of a street, to consider with the other evidence, the cost of adjusting the premises to the new grade, was not error, the measure of damages being fixed by other instructions at the difference between the market value before and after the change.—SMITH v. CITY OF KANSAS CITY, Mo., 30 S. W. Rep. 814.

151. MUNICIPAL CORPORATION — Condemnation of Land.—A municipal corporation is not an "incorporated company," within Const. art. 12, § 4, providing that "the right of trial by jury shall be held inviolate in all trials of claims for compensation, when, in the exercise of the right of eminent domain, any incorporated company shall be interested either for or against such right."—CITY OF KANSAS CITY v. VINEYARD, Mo., 30 S. W. Rep. 326.

152. MUNICIPAL CORPORATIONS—Control of Streets.—Where part of a county road is taken into a municipal corporation by the annexation of contiguous territory, it is subject to the control and supervision of the municipal authorities, who may improve it, by grading or otherwise, at the expense of the corporation.—WABASH R. CO. v. CITY OF DEFIANCE, Ohio, 40 N. E. Rep. 89.

153. MUNICIPAL CORPORATION—Defective Street—Notice.—Under a charter provision that to entitle one to an action for an injury resulting from a defective street, notice of how the injury occurred must be served on the city, plaintiff cannot show that she suffered a miscarriage because of the injury, without stating that fact in the notice.—CITY OF DENVER v. BARRON, Colo., 39 Pac. Rep. 990.

154. MUNICIPAL CORPORATION — Negligence.—A city which allows an obstruction to remain in a street for an unreasonable length of time will be liable for injuries caused thereby, to the same extent as if it had originally placed the obstruction in the street.—SENHENN v. CITY OF EVANSVILLE, Ind., 40 N. E. Rep. 69.

155. NEGLIGENCE—Contributory Negligence.—In an action for injuries, contributory negligence is a matter of defense, and the plaintiff is not required to prove its absence, as a part of his case.—NELSON v. CITY OF HELENA, Mont. 39 Pac. Rep. 905.

156. NEGLIGENCE—County Bridges.—In an action for injuries resulting from the breaking of a county bridge over which plaintiff was passing, experienced bridge builders, who examined the bridge immediately after the accident, and described to the jury the bridge and its plan of construction, could give their opinion as to whether, if it had been kept in repair as originally constructed, the bridge would have

safely sustained a much larger load than that under which it broke.—BONEBRAKE V. BOARD OF COM'RS OF HUNTINGTON COUNTY, Ind., 40 N. E. Rep. 141.

157. NEGLIGENCE—Dangerous Premises.—The plaintiff was injured by the fall of defendant's wall. The defendant denies negligence and alleges, if plaintiff suffered damages, the property was in possession of an insurance company for repairs: Held, that there was negligence, and that, whatever may have been the responsibility of the company during the time that repairs were made to a portion of the wall, the owner, aware of the defect and danger, who takes no part to prevent the accident, is liable for the damage occasioned by the fall.—KNOOP V. ALTER, La., 17 South. Rep. 139.

158. NEGLIGENCE — Fast Driving.—Negligence consisting in driving a team at reckless speed on a public street cannot be overcome by showing an urgent necessity for thus driving.—EATON V. CRIPS, Iowa, 62 N. W. Rep. 687.

159. NEGLIGENCE—Independent Contractor.—A person employed by the agent of the owner of a street railway, at a stipulated sum per month, to run a car and furnish a driver, the car and the road being controlled and the work directed by the agent, is not an independent contractor; and the owner is liable for the negligence of such employee's servants.—JENSEN V. BARBOUR, Mont., 29 Pac. Rep. 906.

160. NEGLIGENCE — Injury to Trespassing Minor.—A charge on the law governing a railway company's liability for injuries to a person on its premises by invitation or permission is not an issue involved, where the evidence clearly shows that, although on previous occasions it may have permitted boys to play about its premises, it had distinctly prohibited and done all in its power to prevent them from doing so on the occasion in question, when a boy was injured by its alleged negligence.—GULF, C. & S. F. RY. CO. V. CUNNINGHAM, Tex., 30 S. W. Rep. 867.

161. NEGLIGENCE — Unguarded Excavation in Sidewalk.—A contractor who has completed an excavation in a sidewalk, as required by his contract, is not liable for injuries to persons falling therein, due to the absence of proper guards, if he did not contract to guard the excavation after it was completed.—COTTER V. LINDGREN, Cal., 39 Pac. Rep. 950.

162. NEGOTIABLE INSTRUMENT—Bills and Notes.—A purchaser of several notes for value and before maturity, without notice of any set-offs, who pays one-half of their aggregate face value, and gives the indorsee credit for the balance, subject to his check, holds all the notes free from any right of set-off in favor of the maker as to any remaining unpaid, and the fact that he may have recovered on part of the notes does not deprive him of the character of a purchaser for value, so as to let in the right of set-off as to the others.—UNITED STATES NAT. BANK OF NEW YORK V. MCNAIR, N. Car., 21 S. E. Rep. 889.

163. NEGOTIABLE INSTRUMENTS—Constructive Knowledge.—Knowledge of such facts as would put a prudent man on inquiry in reference to negotiable paper is, in the absence of bad faith, not sufficient knowledge to affect the rights of a purchaser for value and before maturity.—CLARK V. EVANS, U. S. C. C. of App., 66 Fed. Rep. 263.

164. NEGOTIABLE INSTRUMENT—Extension — Release of Sureties.—Where the holder of a note extends time for payment, the sureties thereon, who had no notice of such extension, will not be released from liability if, on the face of such note, they appear to be principals, and the holder, at the time he extended payment, had no actual notice that they were sureties.—CULBERTSON V. WILCOX, Wash., 39 Pac. Rep. 954.

165. NEGOTIABLE INSTRUMENT — Note — Bona Fide Purchaser.—Where an indorsement on a note restraining the negotiability thereof is fraudulently cancelled by the original holder, the maker may set up failure of consideration, as against an innocent purchaser on the note.—MEADE V. SANDIDGE, Tex., 30 S. W. Rep. 246.

166. NEGOTIABLE INSTRUMENTS — Parol Evidence.—Parol evidence is not admissible to prove that one whose name appears on a note as a joint maker signed it with the understanding that he was not to be held liable thereon. — TACOMA MILL CO. V. SHERWOOD, Wash., 39 Pac. Rep. 977.

167. NEGOTIABLE INSTRUMENT — Promissory Note.—An agreement by the payee of a note, with the maker's widow, that certain sums paid by the maker, and by her after his death, for the payee's benefit, together with a sum paid by her to the payee, should be accepted in full settlement of the note, constitutes a valid satisfaction thereof.—BECK V. SNYDER, Penn., 31 Atl. Rep. 555.

168. NEGOTIABLE NOTE — Bona Fide Purchaser.—Where a negotiable note, given under agreement that it should not be negotiated until a certain contingency arose, was negotiated before that time, the burden is on the indorsee to show that he took it for value, in good faith, and before maturity.—NATIONAL REVERE BANK V. MORSE, Mass., 40 N. E. Rep. 179.

169. NUISANCE—Establishment of Market.—In an action to enjoin the use of a square for a market and weighing place, as being a nuisance, it is immaterial that the ordinance establishing the place is unreasonable, in requiring the entire weighing of the city to be done on one set of scales.—MILLER V. CITY OF WEBSTER CITY, Iowa, 62 N. W. Rep. 648.

170. NUISANCE — Injunction — Street Railways.—An abutting owner on a borough street on which a street-railway company is constructing its electric line without any valid permission of the local authorities may enjoin the construction as a nuisance.—THOMAS V. INTER-COUNTY ST. RY. CO., Penn., 31 Atl. Rep. 476.

171. NUISANCE — Prescription.—The fact that a company was authorized by the city council, under legislative authority, to erect and operate waterworks, does not relieve it from liability for discharging smoke and soot from its smoke-stack on an adjacent residence. —CHURCHILL V. BURLINGTON WATER CO., Iowa, 62 N. W. Rep. 646.

172. OFFICER—Deputy Clerk of Court.—One who has received a written appointment by the clerk of court, as deputy, and has discharged the duties of office thereunder, though his appointment has not been confirmed, and he has not given bonds, as required by Code, § 766, is a *de facto* officer.—WHEELER & WILSON MANUF'G CO. V. STERRETT, Iowa, 62 N. W. Rep. 675.

173. PARTITION—Advancements.—In the partition of the lands of an intestate among his children and the children of a deceased son, the portion which the latter inherit should be charged with an advancement made to their father by such intestate.—PARSONS V. PARSONS, Ohio, 40 N. E. Rep. 165.

174. PARTNERSHIP — Accounting.—In a suit for the dissolution and settlement of a partnership, a personal judgment should not be rendered against one partner for the amount supposed to be due to the other as his share of the profits until the asset are reduced to cash and the debts paid, there being no agreement to the contrary.—GREEN V. STACY, Wis., 62 N. W. Rep. 628.

175. PARTNERSHIP — Insolvency—Discharge.—A nonresident creditor holding a claim against each of two firms consisting in part of the same members, and who are included in the same insolvency proceedings, who proves his claim against only one of such firms, and votes for an assignee, and takes a dividend thereon, is not debarred by a discharge of the debtors comprising such firm's firm from subsequently maintaining an action upon the other claim.—PATTEE V. PAIGE, Mass., 40 N. E. Rep. 108.

176. PLEADING—Action for Services—Defective Complaint. — A complaint showing the employment of plaintiff by defendant to sell land, and that he sold the land and was not paid for his services, is sufficient after verdict, though its allegations of facts are very

indefinite and uncertain.—HARTER v. PARSONS, Ind., 40 N. E. Rep. 147.

177. PRINCIPAL AND AGENT — Authority of Agent.—An agent authorized to let the whole of a tract of land for one year from November for $600 cannot bind his principal by a lease of a part of the tract for $225, for a term exceeding one year, and commencing in the April preceding November.—BORDERRE v. DEN, Cal., 39 Pac. Rep. 345.

178. PROCESS — Appearance — Waiver of Defective Service.—Where a defendant against whom there was service by publication appears and asks, after judgment, to have the same set aside, and to defend, he waives all irregularities in the service of process.—MAYER v. MAYER, Oreg., 39 Pac. Rep. 1002.

179. PROCESS — Summons — Service on Receiver. — A valid service of summons upon a railroad company in the hands of receivers may be made upon a local agent of the receivers.—GRADY v. RICHMOND & D. R. CO., N. Car., 21 S. E. Rep. 304.

180. PROHIBITION—County Court—Certificate of Election.—A county court, having canvassed and certified the returns of a county-seat election, afterwards recanvassed the vote, and changed the result previously certified: Held, that this was an unauthorized assumption of judicial power against which a writ of prohibition would lie.—STATE v. ELKIN, Mo., 30 S. W. Rep. 334.

181. PUBLIC LANDS—Proofs in Pre-emption Entries.—The duty imposed by Rev. St. § 453, upon the commissioner of the general land office, to perform, under the direction of the secretary of the interior, "all executive duties" appertaining to the surveying and sale of the public lands, vests in the commissioner and secretary a right to review the action of the register and receiver in accepting proofs of settlement and improvement under the pre-emption laws, whether such proofs are made solely by affidavit or by oral evidence in addition thereto; and the provision of Rev. St. § 2263, requiring such proofs to be made "to the satisfaction" of the register and receiver, does not make their action final.—ORCHARD v. ALEXANDER, U. S. S. C., 15 S. C. Rep. 635.

182. RAILROADS—Accident at Crossing—Negligence.—One who, although having a clear view for 20 feet before reaching the crossing of a railroad track for 300 feet in the direction of an approaching train, goes upon the crossing without stopping to look and listen for a train, is guilty of such contributory negligence as will prevent a recovery for personal injuries sustained by being struck by a train, though there may have been some negligence on the part of those in charge of it.—LOUISVILLE, N. A. & C. RY. CO. v. STEPHENS, Ind., 40 N. E. Rep. 148.

183. RAILROAD AID BONDS—Election to Authorize.—A compromise decree entered in a suit by a railroad company to compel the issuance of railroad aid bonds, releasing the town from liability for one-half of its subscription in consideration of the issuance of bonds for the remaining portion, estops the town from thereafter disputing the validity of the bonds issued pursuant to the decree.—UNION BANK OF RICHMOND, VA., v. BOARD OF COM'RS OF TOWN OF OXFORD, N. Car., 21 S. E. Rep. 410.

184. RAILROAD COMPANY—Negligence.—In an action for injuries received at a railway crossing, it appeared that the train could not be seen, on account of an embankment on which corn and weeds were growing, until the traveler was within 25 feet of the crossing, from which place a train could be seen for a quarter of a mile in either direction: Held that, though plaintiff stopped and listened for an approaching train when 200 feet from the crossing, her failure to again stop and look after passing the obstruction rendered her guilty of negligence.—KELSAY v. MISSOURI PAC. RY. CO., Mo., 30 S. W. Rep. 339.

185. RAILROAD COMPANY — Accident at Crossing—Negligence.—The fact that a person, injured while knowingly crossing a railroad track, had an unobstructed view of the railroad so as to know of the approach of a train in time to have avoided the injury, had he looked, cannot be said to constitute negligence *per se*, so as to relieve from liability a defendant company, which had neglected to signal as required by law.—TURNER v. FORT WORTH & D. C. RY. CO., Tex., 30 S. W. Rep. 253.

186. RAILROAD COMPANY—Attempt to Board Moving Car.—A charge declaring one to be a passenger who attempted to get on a car, with the intention of paying his fare when called upon, without qualification as to the time, place, or manner of such attempt, is erroneous.—SCHAEFER v. ST. LOUIS & S. RY. CO., Mo., 30 S. W. Rep. 330.

187. RAILROAD COMPANIES—Cattle Guards—Constitutional Law.—Code, 1892, § 3561, requiring a railroad corporation to construct and maintain "proper stock gaps and cattle guards," is a legitimate exercise of the police power of the State.—KANSAS CITY, M. & B. R. CO. v. SPENCER, Miss., 17 South. Rep. 168.

188. RAILROAD COMPANIES — Defective Crossing.—Where a railroad company maintains a crossing upon its track, it must use ordinary care to keep it in suitable condition for travel, although such crossing has not been made a public road by law.—TEXAS & P. RY. CO. v. NEILL, Tex., 30 S. W. Rep. 369.

189. RAILROAD COMPANY — Fire. — In an action for a fire started by sparks from an engine, it is error to instruct that if the wind causing the escape of sparks from defendant's engine was "unusual and extraordinary," and if, but for the "unusual and extraordinary" character of the wind, the sparks would not have escaped, and communicated the fire to plaintiff's premises, defendant is not liable, without explaining the meaning of the words "unusual and extraordinary," so as to present to the jury the question whether the wind could have been reasonably expected at that season in that section of the country, the witnesses having described the wind in general terms as "hard," "unusual," and "extraordinary."—BLUE v. ABERDEEN & W. E. R. CO., N. Car., 21 S. E. Rep. 300.

190. RAILROAD COMPANY—Street Railway.—A charter of a street railway authorized the building of its line though several townships under the act of 1889, making the consent of the local authorities a condition precedent. It obtained the consent of one of the townships, but not of others: Held, that an injunction restraining the building of its line in the township which had given its consent was not a repeal of the charter, but simply required the company to keep within the limits of its charter, and build the road connecting the several townships.—LEHIGH COAL & NAV. CO. v. INTER-COUNTY ST. RY. CO., Penn., 31 Atl. Rep. 471.

191. RELEASE—Parol Evidence to Vary.—The consideration mentioned in a written release of a railroad company from liability for personal injuries, reciting the receipt of a specified sum, and that the company shall be released from all further liability, is not contractual, and parol evidence is admissible that such release was not supported by any consideration.—STEWART v. CHICAGO & E. I. R. CO., Ind., 40 N. E. Rep. 67.

192. REMOVAL OF CAUSES—Diverse Citizenship.—The citizenship of parties which determines the right to remove a cause to a Federal Court is that of the parties as persons, and not an official citizenship, acquired in a representative capacity.—WILSON v. SMITH, U. S. C. C. (Penn.), 66 Fed. Rep. 81.

193. REMOVAL OF CAUSES—Forum of Jurisdiction.—An application for removal from a State to a Federal Court on the ground of local prejudice must be made to the federal, and not to the State court.—WILLIAMS v. SOUTHERN BELL TELEPHONE & TELEGRAPH CO., N. Car., 21 S. E. Rep. 298.

194. REMOVAL OF CAUSES — Jurisdiction.—A cause cannot be removed from a State court to a Circuit

Court of the United States on the ground that a federal question is involved, unless that appears by plaintiff's statement of his own claim.—HAGGIN v. LEWIS, U. S. C. C. (Mont.), 66 Fed. Rep. 199.

195. REMOVAL OF CAUSES—Time of Filing Transcript.—While, upon removal of a cause from a State to a Federal Court, security is required that the transcript shall be filed on the first day of the next succeeding term, the Federal Court is not to be deprived of jurisdiction if the transcript is filed at a later day in the term, but, for good cause, may permit it to be filed at such later day.—LUCKER v. PHOENIX ASSUR. CO. OF LONDON, U. S. C. C. (S. Car.), 66 Fed. Rep. 161.

196. RES JUDICATA.—Where a judgment debtor, duly summoned to appear and show cause why the judgment should not be reviewed, fails to appear and set up a defense of part payment, the question of payment is *res judicata*.—BABB v. SULLIVAN, S. Car., 21 S. E. Rep. 276.

197. RES JUDICATA.—Where an essential allegation was wanting in a complaint to which a demurrer was sustained, a subsequent decree of dismissal is not a bar to a second suit brought to enforce the same right.—O'HARA v. PARKER, Oreg., 39 Pac. Rep. 1004.

198. RES JUDICATA — Judgment for Land.—Under Hill's Ann. Laws, § 329, making the judgment in an action for the possession of real property conclusive of the estate in, and the right to the possession of, such property, upon the judgment defendant, and those claiming under him, after the commencement of the action, the judgment operates as a bar to a subsequent action from the date of its recovery.—BARRELL v. TITLE GUARANTEE & TRUST CO., Oreg., 39 Pac. Rep. 992.

199. RES JUDICATA—Judgment in Partition.—Where an heir, a party to a partition suit between a widow and heirs, failed to assert a claim to the land under a deed previously given her by the widow, a judgment in the suit, allotting the widow the land in fee under the right of homestead, precludes the heir from afterwards asserting such claim.—KETCHUM v. CHRISTMAN, Mo., 30 S. W. Rep. 313.

200. SALE—Action for Breach.—The title to a crop of raisins does not pass to the buyer, under a contract requiring payment on delivery, so as to make it essential to a recovery by the seller for the buyer's failure to accept the raisins that he shall have resold them as pledged property, where the raisins were refused by the buyer on account of delay, after having been previously refused by him because not properly packed; but a private sale at the highest price obtainable is sufficient.—HEWES v. GERMAIN FRUIT CO., Cal., 39 Pac. Rep. 853.

201. SALE—Delivery.—Where plaintiff consigned potatoes to defendants by bill of lading, and defendants presented the bill to carrier, received the potatoes, and afterwards admitted an indebtedness for them, the sale and delivery are complete.—HERBERT v. WINTERS, Mont., 39 Pac. Rep. 906.

202. SALE—False Representations.—To render a vendor liable in tort for fraudulent representations on the sale of a horse, knowledge on his part of the falsity of the representations must be proved.—MCGLADE v. MCCORMICK, N. J., 31 Atl. Rep. 460.

203. SALE — Measure of Damages.—The measure of damages for the breach by a purchaser of his agreement to honor a sight draft for part of the price, and to execute his notes for the balance to the seller, who retains the title until their payment, is not the contract price of the goods, but the difference between such price and their market value at the time and place of delivery; and, in the absence of any proof by the seller as to such difference, he is entitled to nominal damages only.—TUFTS v. BENNETT, Mass., 40 N. E. Rep. 172.

204. SALE OF BINDER—Warranty.—The fact that an article sold is entirely worthless will defeat an action for the purchase price, though there be no fraud or breach of warranty.—MCCORMICK HARVESTING MACH. CO. v. BROWER, Iowa, 62 N. W. Rep. 700.

205. SALE OF BUSINESS—Consideration.—A bill of sale of a stock of goods recited that the vendor sells certain goods for a certain sum paid, and that the vendor will not engage in the same business within a certain distance of his former place of business: Held, that the consideration paid was not only for the goods, but also for the agreement not to engage in the business.—EISEL v. HAYES, Ind., 40 N. E. Rep. 119.

206. SALE UNDER JUDGMENT—Effect on Prior Lien.—Where one who owns two judgment liens on the same land sells it under the junior lien, without fraud or representations of any kind, the seller is not estopped by such sale, and the receiving of the money thereunder from selling the land again to satisfy the first lien.—MATLESS v. SUNDIN, Iowa, 62 N. W. Rep. 662.

207. SCHOOLS — Expulsion of Scholar.—Conduct of a pupil at a boarding school, in continually playing truant, and in finally leaving for his home, is ground for expulsion; the pupil's father refusing to permit the school teacher to whip his son for misconduct, and taking no steps himself to correct him.—FESSMAN v. SEELEY, Tex., 30 S. W. Rep. 268.

208. SET OFF—Partnership.—The amount of a note payable to a partner individually cannot be set off by him against a partnership indebtedness, in an action thereon by the maker of the note.—ROGERS v. MCMILLEN, Colo., 39 Pac. Rep. 891.

209. SLANDER— Evidence.—Where, in an action for slander, for charging plaintiff with robbery, defendant contends that the words were intended to be used as merely charging plaintiff with having wronged him in a business transaction, and that they were so understood by the person in whose hearing they were spoken, evidence as to whether plaintiff had in fact wronged defendant is inadmissible.—MCCORMACK v. SWEENEY, Ind., 40 N. E. Rep. 114.

210. SPECIFIC PERFORMANCE—Parties.—In an action to compel conveyance to complainants of certain property, one who has disposed of the legal title to all his interest in the property, and against whom no relief is demanded, should not be made a party to the action.—BURRILL v. GARST, R. I., 31 Atl. Rep. 436.

211. TAXATION—Assessment—Collateral Attack.—The action of a county board of review in revising and increasing a person's tax schedule, after having obtained jurisdiction over him by statutory notice, is not subject to collateral attack by a suit to enjoin the collection of the taxes; his remedy being by appeal to the State board of tax commissioners.—SENOUR v. MATCHETT, Ind., 40 N. E. Rep. 122.

212. TELEGRAPH COMPANIES—Illegal Rates. — Where a telegraph company has a continuous line between two points in the State, it cannot defend an action for violation of the rate prescribed by the commissioners for the transmission of a message sent over the lines of one company, on the ground that the message was in fact sent over the lines of two companies.—LEAVELL v. WESTERN UNION TEL. CO., N. Car., 21 S. E. Rep. 392.

213. TOWN—Jails—Injuries to Prisoners. — Where a town provides in its prison the necessaries to protect a prisoner from bodily suffering, it is not liable for injuries to his health, caused by the failure of the custodians of the jail to supply him with such necessaries, where its governing officers were not negligent in exercising a proper supervision over the custodians.—SHIELDS v. TOWN OF DURHAM, N. Car., 21 S. E. Rep. 403.

214. TRADE-MARK—Injunction.—The use of the word "Dover" merely as the name of a certain kind of egg beater, will not constitute such word a trade-mark, so as to entitle the proprietor, after his patent has expired, to enjoin its use by a munufacturer of other egg beaters.—DOVER STAMPING CO. v. FELLOWS, Mass., 40 N. E. Rep. 105.

215. TRESPASS—Action for Destroying Trees.—In an action under Code, § 3290, for destroying trees on

plaintiff's land without plaintiff's consent, the burden rests upon plaintiff to prove want of consent on her part.—ROGERS v. BROOKS, Ala., 17 South. Rep. 98.

216. TRESPASS—Evidence.—Where the dividing line between adjoining owners was uncertain, and they fixed and acquiesced in a temporary boundary, up to which they planted crops on either side, such actual possession up to the line is acquired as will support a prosecution for trespass.—SHERMAN v. STATE, Ala., 17 South. Rep. 102.

217. TRIAL—Demurrer to Evidence.—A demurrer to the evidence admits the truth thereof, and also such conclusions as the jury may farily and justifiably draw therefrom. Forced or violent inferences from the evidence are not thereby admitted, but the testimony is to be taken most strongly against the demurrant, and such conclusions as a jury might justifiably draw therefrom the court ought to draw. — WILKINSON v. PENSACOLA & A. R. CO., Fla., 17 South. Rep. 71.

218. TRUSTS—Limitations.—In the case of an implied or constructive trust, unless there has been a fraudulent concealment of the cause of action, lapse of time is as complete a bar in suits in equity as in actions at law; and the bar of the statute begins to run when the cause of action has accrued.—MERRILL v. TOWN OF MONTICELLO, U. S. C. C. (Ind.), 66 Fed. Rep. 165.

219. TRUST DEED—Validity.— The fact that one of several debts secured by a deed of trust is fictitious does not render the conveyance void as to the creditors who accepted the deed, in good faith, to secure their claims against the grantor.—MUSE v. CHANEY, Tex., 30 S. W. Rep. 374.

220. VENDOR AND PURCHASER.—Where the vendor of land reserves a lien on the land to secure the purchase price, the superior title remains in him until the price is paid, and on default in payment he may rescind the sale, and a deed to the land to a third person conveys the absolute title. — MORRISON v. BARRY, Tex., 30 S. W. Rep. 376.

221. VENDOR AND PURCHASER — Rescission of Contract.—A contract for the sale of land will not be rescinded because the vendor did not own the land when the contract was made, unless the vendee was induced to enter into the contract by representations of the vendor that he did own it.—WEBB v. STEPHENSON, Wash., 39 Pac. Rep. 952.

222. VENDOR AND PURCHASER—Statute of Frauds.—When a purchaser of land goes into immediate posession and gives his vendor a note for the price, which contains a description of the land and all essential terms of the contract, the sale is taken out of the statute of frauds.—REYNOLDS v. KIRK, Ala., 17 South. Rep. 95.

223. VENDOR AND VENDEE—Sale of Land—Deed.—The provisions of a contract for the sale of land are, as a general rule, merged in the deed subsequently made in full execution of the contract of sale.—WEST BOUNDARY REAL ESTATE CO. OF BALTIMORE CITY v. BAYLESS, Md., 31 Atl. Rep. 442.

224. WATERS—Diverting Natural Flow—Damages.—A landowner is liable only for nominal damages for constructing a tile drain on his land, through which a larger quantity of water than the natural flow is discharged upon the lands of an adjoining owner, where the only injury shown to have been sustained by the latter is such increase in the flow of water on his land. —MCCORMICK v. WINTERS, Iowa, 62 N. W. Rep. 654.

225. WATER COMPANIES— Authority—Contract.—It is not within the authority of a superintendent of a water company to contract on its behalf to furnish an hotel water at a less rate than it charges to consumers generally, and is provided for by the city ordinances relating to such company.—MERIDAN WATERWORKS CO. v. SCHULHERR, Miss., 17 South. Rep. 167.

226. WILL — Charge on Real Estate. — Where testator bequeaths to his wife a stated sum and all of his property for life, and gives certain pecuniary legacies to various persons, and devises all the remainder to persons named in specified shares, such legacies, on the death of the wife, are not a charge on the real estate, the personalty being insufficient for their payment.—PEARSON v. WARTMAN, Md., 31 Alt. Rep. 44.

227. WILLS — Conditions of Annuity.— Under a will directing the executors to pay a grandson an annuity from testator's share of a certain partnership, if the grandson devotes so much of his personal attention to the business and to testator's estate as shall satisfy a committee named that he is entitled thereto, the performance of such services is a condition precedent to the payment of the annuity.—STEELEY v. HINCKS, Conn., 31 Atl. Rep. 582.

228. WILLS — Description of Devisees' Heirs.—In a devise of a daughter's share of testator's estate to her for life, with remainder "to her heirs and their assigns," the word "heirs" means her heirs generally, and not her children, where the same term is used in various other parts of the will in referring to devisees and those taking after them, none of whom are shown to have had any children.—DURBIN v. REDMAN, Ind., 40 N. E. Rep. 135.

229. WILL — Devise to Children.—Testator gave the residue of his property to trustees, one-half of the income to be paid to his "children here named." All of his children were then named. The trust was to continue until the death of the last child. No provision was made for the disposition of the share of the income of any child after its death, except that in a codicil, made after the death of one of the children, it was provided that all legacies should be paid to the legal heirs of any beneficiary dying before testator: Held, that the children took individually as tenants in common, so that on the death of any child his share of the income became assets of his estate.—MORRIS v. BOLLES, Conn., 31 Atl. Rep. 538.

230. WILLS — Nature of Estate.—Under Code § 1852, providing that in all cases where an absolute power of disposition is given to the owner of a particular estate, unaccompanied by any trust, and no estate is limited on the estate of the donee of the power, he is entitled to an absolute fee; and section 1853, providing that a power to devise the inheritance given to a life tenant is an absolute power,—a devisee of a life estate with power to dispose by will of one-half the estate takes, as to such half, a fee absolute, which descends to her heirs in case she dies intestate.—HOOD v. BRAMLETT, Ala., 17 South. Rep. 106.

231. WILLS—Validity—Witness.—That the husband of a life devisee of lands was a subscribing witness to the will, does not destroy the remainder interests, and render the estate distributable as in the case of intestacy, but the remainders are thereby accelerated, and take effect at once, under Rev. St. S. C. § 1991, which provides that a devise to which the husband of the devisee is a subscribing witness shall be void to the extent that the amount of the devise exceeds the amount the devisee would have taken as heir.—KEY v. WEATHERSBEE, S. Car., 21 S. E. Rep. 324.

232. WILL CONTEST—Evidence.—Evidence that a testatrix was quite sick at the time her will was executed, and that after her recovery she stated that she could not remember anything that happened during her sickness was not sufficient to prove a want of testamentary capacity.—HENRY v. HALL, Ala., 17 South. Rep. 187.

233. WITNESS—Conversation with Decedent.—In an action by the administrator of H against a sheriff for levying on and selling the property of H under an execution against K, the interest of a surety on the indemnity bond given the sheriff is adverse to plaintiff, so that he cannot testify to a conversation with H in which she admitted that the title to the property was in K.—KYTE v. FORAN, Penn., 31 Atl. Rep. 575.

234. WITNESS — Impeachment.—The credibility of a witness may be impeached by proof of statements out of court contrary to his testimony.—HOLLEY v. STATE, Ala., 17 South. Rep. 102.